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# IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1995

ROBERT A. MCWHORTER,

*Petitioner,*

v.

GRIEVANCE ADMININSTRATOR,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

## PETITION FOR WRIT OF CERTIORARI

Robert A. McWhorter
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4611 W. Main St.
Kalamazoo MI 49006
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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the retroactive application by the Michigan Supreme Court of a new rule that a disbarred attorney must wait to apply for reinstatement for 5 years after his release from parole, only because he was placed on some form of penal supervision, rather than five years after his license was revoked, as specified by Michigan Court Rules MCR 9.123 and 9.124, when the attorney had already completed application, underwent public hearings and appeals, retrospectively changes the legal consequences of Petitioner's conviction, inflicts a greater punishment than the law annexed to the offense when it was committed and deprived Petitioner of a vested right in violation of the Ex Post Facto Clause of Article 1, Section 10 and the 5th Amendment of the United States Constitution?

II. Whether Petitioner, who established by "clear and convincing evidence" the criteria for reinstatement prescribed by Michigan Court Rules, was denied due process, in contravention of the 14th Amendment of the United States Constitution, when the Michigan Supreme Court, retroactively, held that Petitioner may not apply for reinstatement until "five years after his release from federal parole," in violation of its state constitution, state statutes and its own court rules while addressing issues, never briefed, never argued, and never heard, and with an appearance of impropriety, while withdrawing its certification of Petitioner's eligibility to seek reinstatement?

III. Whether the retroactive application to Petitioner of the new rule that a disbarred attorney must wait to apply for reinstatement until 5 years after his release from parole because he was placed on some form of penal supervision, rather than five years after his license was revoked, as specified by Michigan Court Rules, applying to Petitioner a different standard than applied to all other Michigan lawyers, similarly situated, under the same or similar circumstances with an apparent delegation of judicial authority to the prosecution, constitutes a denial of equal protection in contravention of the 14th Amendment of the United States Constitution?

## LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Parties to the appeal in the Michigan Supreme Court were:

Robert A. McWhorter, Petitioner-Appellee (Petitioner)
Phillip J. Thomas, Grievance Administrator-Attorney Grievance Commission, Respondent-Appellant (Respondent)

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The Opinion of the Michigan Supreme Court whose Opinion is herein sought to be reviewed, is reported at Reinstatement of Robert McWhorter, 449 Mich 130, 534 NW2d 480 (1995) and is reprinted in the separate Appendix A. Prior Opinions of the Michigan Supreme Court, reprinted in Appendix B are reported as follows: Order Staying Reinstatement and Denying Motion to Strike __ Mich __, 522 NW2d 631 (1995); Leave to Appeal Granted 447 Mich 1202, 525 NW2d 454 (1995); Order Denying Petitioner's Motion to Strike 448 Mich 869, 530 NW2d 751 (1995). The Order denying rehearing has not been reported. A copy of the Order appears in Appendix C. Additionally attached as Appendix D is the unpublished Opinion and Order of Reinstatement by the Attorney Discipline Board, May 20, 1994; and Appendix E, Opinion and Order of Reinstatement of Tri-County Hearing Panel #15, April 7, 1993; and Supplemental Report dated December 10, 1993.

## STATEMENT OF JURISDICTION

The Opinion of the Michigan Supreme Court was entered July 5, 1995 and rehearing was denied September 19, 1995. Jurisdiction of this Court is invoked under 28 USC §1257 which permits review of a final judgment of the highest court of a state.

## CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, RULES AND REGULATIONS INVOLVED

**United States Constitution**

**Article 1 §10**
**5th Amendment**
**14th Amendment**

**Michigan Constitution of 1963**

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## STATEMENT OF CASE

This is a case regarding an application for reinstatement to practice law. A case where the triers of fact found Petitioner's conduct, since the revocation of his license, to have been exemplary and above reproach and that Petitioner had established by clear and convincing evidence that he should be reinstated. However, he was denied reinstatement. The statement of the case is excerpted directly from the Michigan Court Rules, (Appd I and J), the findings of fact set forth in the opinions of the Michigan Attorney Discipline Board and its hearing panel, (Appd D and E) and the Opinion of the Michigan Supreme Court (Appd A).

**Reinstatement Procedure**

Michigan has unusual disciplinary and reinstatement procedures. Effective October 1, 1978, the Michigan Supreme Court created by court rule, an administrative procedure to supervise and discipline Michigan attorneys, including reinstatement. Amended, modified, and readopted in 1985, but substantially unchanged, the Court divided supervision and discipline into two arms: the Attorney Grievance Commission, the prosecutorial arm; and the Attorney Discipline Board, the adjudicative arm.
(Appd I and J)

The Attorney Discipline Board appoints three members to each hearing panel to hold public hearings, receive evidence and make written findings of fact under the rules governing practice and procedure in a nonjury civil action.

Review of a hearing panel order is by written appeal setting forth "the reasons and grounds upon which review is sought." The Attorney Discipline Board, on timely filing,

issues an order to show cause why the order of the hearing panel should not be affirmed.

On review, the Board determines whether or not the findings of the hearing panel have proper evidentiary support on the whole record. The Board, at the same time, possesses a measure of discretion with regard to its ultimate decision. (Appd p.44a)

Judicial review by the Michigan Supreme Court is by leave (Appd p.96a). Pursuant to Article 6 §28 of the Michigan Constitution of 1963, judicial review is whether the findings of the hearing panel and Attorney Discipline Board "are supported by competent, material and substantial evidence on the whole record." (Appd p.81a)

Petitioner is currently 56 years of age and was licensed to practice law in the State of Michigan in 1966. Effective February 24, 1981, Petitioner's license to practice law was revoked pursuant to two separate felony convictions. (Appd p.41a, 57a, 61a, 62a)

Under Michigan Court Rule MCR 9.123, (Appd p.97a-99a) an attorney whose license has been revoked for 5 years may apply for reinstatement. On April 1, 1992, Petitioner filed with the Michigan Supreme Court a petition for reinstatement with copies to the Attorney Grievance Commission and Attorney Discipline Board. Thereafter, the Attorney Grievance Commission conducted an investigation, submitted Petitioner's application for publication in the Michigan Bar Journal, and a public hearing was scheduled before a hearing panel.

**Hearing Panel Proceedings**

Public hearings were conducted before the panel on four separate days between August 12, 1992 and November 9, 1992. In the course of those hearings, Petitioner offered

17 witnesses in support of his reinstatement. Their testimony was strong and persuasive. These witnesses included:

1) The pastor and two members of Petitioner's church testified that petitioner has been an active member, participates in a number of church activities, particularly the "extended family" program, and that Petitioner has a reputation for honesty and trustworthiness, among the church congregation.

2) Three attorneys from the area where Petitioner resides testified that they had hired Petitioner and his company, Research Unlimited, on more than one occasion to do legal research and write appellate briefs. Each testified that he had a high opinion of petitioner's work product, his legal capabilities, and personal qualities and each found him to be honest and trustworthy.

3) Two other area attorneys offered testimony of their personal and/or professional relations with the Petitioner during the period of revocation. One of these witnesses testified to his admiration of the Petitioner's "ethical morality", the other testified to the Petitioner's "keen awareness of ethical standards";

4) A former legal assistant testified that she considered Petitioner to be a mentor and another legal secretary/legal assistant, who had known Petitioner since 1985, testified to the high quality of his legal research, his devotion to the law and both testified to his honesty and integrity.

5) An auto salesman who met Petitioner shortly after he was released from prison and who has known him for approximately seven years testified as to Petitioner's honesty and rehabilitation.

6) Suzanne Kallan, PhD, a clinical psychologist

testified that Petitioner had been in treatment with her on a regular basis since 1986. She found the Petitioner to be candid and forthright with her regarding his background, including his criminal convictions. She testified that the petitioner had benefited from psychotherapy and had made psychological and emotional adjustments during his six years of therapy.

7) An attorney who has known Petitioner since 1985, testified that his former law firm had hired the Petitioner to do some research on complex cases and that he had an opportunity to work with Petitioner on some of that research. He, as did all of the attorneys, testified that Petitioner referred to himself as a "researcher", never as an attorney and that Petitioner was sensitive to ethical issues.

8) Another attorney, who has known Petitioner since 1975, testified to the panel about Petitioner's former drinking problems and the changes in Petitioner's attitudes and personality over the past several years to the point that while he and the Petitioner had had conflicts and personality clashes in the past, he would now be willing to associate with Petitioner professionally in the event of his reinstatement.

9) Petitioner's family also testified. Petitioner's daughter, a licensed attorney, testified about her father's attitude and personality changes since his incarceration and how he now takes more interest in church and family. Petitioner's son, also an attorney, testified to the Petitioner's devotion to the law and his resulting motivation to become an attorney. Petitioner's wife testified to Petitioner's efforts to reestablish his relationship with his family and community. She testified that she first noticed these changes while he was in prison, where he attended AA, taught other inmates to

read and participated in a marriage encounter group. She also testified as to Petitioner's decision to go into therapy after his release from prison as well as the end of his abuse of alcohol.( Appd p.45a-48a, 63a-65a)

In addition to the witnesses, Petitioner also testified. The hearing panel had an opportunity to consider and evaluate Petitioner's credibility and sincerity. (Appd p.45a)

After listening to all of the evidence, the hearing panel concluded "that petitioner's conduct since revocation of his license has been exemplary and above reproach"; that Petitioner "has a proper understanding of and attitude imposed of members of the bar" and that Petitioner "has not practiced or attempted to practice law since his license was revoked." (Appd p.66a) As to whether Petitioner could be safely recommended to the public, the courts and the legal profession, the panel stated:

> **"This panel is well aware of the seriousness of the acts which led to the petitioner's conviction and revocation of his license to practice law and the majority concludes that he has sufficiently satisfied this requirement as stated in our conclusion."**(Appd p.66)(Emphasis added)

The panel further stated:

> "Mr. McWhorter has sought to rehabilitate himself with his family, and his community. As serious as his crimes were, **the Court rules, have at all times since his disbarment, led the petitioner to believe that he could file a petition for reinstatement after five years....** Had the Supreme Court wished to preclude certain

offenders from ever applying for reinstatement, it would have done so pursuant to its rule making powers....
(Appd p. 67a)(Emphasis added)

The hearing panel concluded:

> **"However, we are persuaded on the whole record, that Mr. McWhorter has established by clear and convincing evidence that he should be reinstated to the practice of law....**(Appd p.67a) (Emphasis added)

On April 8, 1993, a majority of the hearing panel ordered Petitioner's reinstatement with conditions. Grievance Administrator appealed to the Attorney Discipline Board.

**Attorney Discipline Board Proceedings**

The Board issued an order to the parties to show cause on May 8, 1993, why the hearing panel's order should not be affirmed. However, prior to such hearing, the Board on its own motion, remanded the matter to the hearing panel for an evidentiary hearing and supplemental report on the nature and scope of Petitioner's supervision while on parole, which was filed December 18, 1993.

The Attorney Discipline Board, on appeal, noted:

> **"The Grievance Administrator does not challenge the panel's factual findings as to those eligibility requirements of MCR 9.123(B) which may be verified objectively, for example whether five years have elapsed since revocation [MCR 9.123 (B)(2)], whether or not the petitioner has practiced or attempted to**

**practice law during the period of revocation [MCR 9.123(B)(3)l; the applicant's compliance with the order of revocation MCR 9.123(B)(4)l, and whether or not the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)l.**

Rather, the Board is asked to rule that the hearing panel erred in finding that the petitioner established the requirements of MCR 9.123(B)(5), that the petitioner has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards, and MCR 9.123(B)(7), that he can be safely recommended to the public, the courts and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and in general to aid in the administration of justice as a member of the bar and as an officer of the court.

* * *

In short, the Board's review in reinstatement cases must combine and balance the standards enunciated by the Court. i.e. review of the panel's findings for proper evidentiary support, recognition of the element of subjective judgment which is applicable to MCR 9.123(B) and, finally, the measure of discretion granted to the Board with regard to

its ultimate decision.

> **Applying that standard of review to the record in this case, we believe that the hearing panel's decision to grant reinstatement should be affirmed."** (Appd p.43a, 45a,)(Emphasis added)

The Attorney Discipline Board noted that the order revoking Petitioner's license was effective February 24, 1981 and stated:

> **The petitioner passed the temporal milepost created by MCR 9.123(B)(2) on February 24, 1986 and he was eligible to file a petition for reinstatement at that time. In fact, another six years elapses before the petitioner petitioned for reinstatement on April 6 1992.** The record discloses that the criminal conduct engaged in by the petitioner occurred during the years 1977 and 1978. Under [Grievance Administrator v] August, [438 Mich 296, 475 NW2d 256 (1991)] it is appropriate to consider the fourteen year period since the commission of the acts resulting in disbarment. (Appd p.51a) (Emphasis added)

After reviewing pertinent case law, the Board supported the hearing panel's conclusion that:

> When the egregiousness of the petitioner's conduct was weighed against the fourteen years which had elapsed since the misconduct and the eleven years since the effective date of the order of revocation, the scale was not

tipped against reinstatement. (Appd p.53a)

Regarding Petitioner's parole supervision, the Board stated:

> Based upon the supplemental testimony of two federal parole officers assigned to petitioner McWhorter, we cannot conclude that the petitioner was under strict restraint and supervision from 1985 to 1992....On the contrary, the testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo. This petitioner lived, worked and engaged in sufficient contacts with his community as a whole during the seven years following his incarceration to sharply differentiate this case from the situation presented in [Matter of the Reinstatement Petition of Evan H.]Callanan [Jr, 440 Mich 1207, 487 NW2d 750 (1992)]. (Appd p.54a-55a)

The Attorney Discipline Board concluded that the hearing panel's decision to grant reinstatement was based on ample evidentiary support and "was appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B)." The Board further concluded that the interim conditions ordered by the panel were unnecessary and ordered unconditional reinstatement. (Appd p.56a, 58-59a) Grievance Administrator petitioned the Michigan Supreme Court for leave to appeal.

**Michigan Supreme Court Proceedings**

During the pendency of the application, Petitioner sought readmission and was instructed by the Board of Law Examiners to take the Michigan Bar Examination. Petitioner passed the Bar Examination. On August 24, 1994 the Supreme Court stayed the orders of reinstatement by the Hearing Panel and the Attorney Discipline Board. (Appd p.33a-34a)

Leave to appeal was granted on October 19, 1994. (Appd p.32a) Grievance Administrator, as with its appeal to the Board, did not challenge the hearing panel's factual findings as to eligibility requirements of MCR 9.123(B). Grievance Administrator argued on appeal, that the seriousness of Petitioner's offenses precluded his reinstatement to the practice of law and argued that insufficient time had passed since Petitioner's release from parole to allow readmission.

Oral arguments were held on March 8, 1995. On July 5, 1995, (Appd A) the Michigan Supreme Court issued its Opinion. The Opinion of the Court was divided 2-2-1-1-1. Chief Justice Brickley wrote the two Justice Opinion in which four Justices concurred in part with one dissent. Mr. Justice Brickley wrote:

> We initially note that the decision whether to reinstate a disbarred attorney is a balancing process. Moreover, we conclude that a proper analysis of subrules 6 and 7 requires the balancing of several factors. In reviewing the various factors, we recognize that no one factor is conclusive, but, rather, each must be evaluated in light of the others.
>
> Specifically, we must consider whether

petitioner has spent sufficient time outside the supervision of parole authorities and convincingly establish that he has satisfied the requirements of subrules 6 and 7.(Appd 10a)

* * *

Petitioner in the present case applied for reinstatement three months before his release from his federal parole. The Attorney Discipline Board remanded the case to the hearing panel to determine the nature and scope of the federal parole authorities' supervision. The board held that petitioner was not subject to rigid authority during his final period of parole. However, the critical consideration is not the extent of supervision, but rather the fact that petitioner was under the supervision of parole authorities at the time he applied for reinstatement. Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner had not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may safely therefore be recommended for reinstatement.

> Although he may not have been subject to strict scrutiny by parole authorities, petitioner was still serving his parole and, upon petition for reinstatement, must demonstrate his honorable behavior outside such authorities for a period that would enable this Court to safely recommend him to the public. To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole. (Appd pp. 11a-12a)

In a footnote Judge Brickley added:

> We note that even though a period of time has now elapsed since petitioner was under the supervision of parole authorities, he has been involved in his petition for reinstatement since his release from parole. Therefore, we are equally unable to safely judge whether petitioner has now been rehabilitated-even though some time has elapsed outside the supervision of parole authorities-because his actions have been under similar, if not heightened, scrutiny by the Attorney Grievance Commission, the hearing panel, and the Attorney Discipline Board. (Appd p.25a)

Justice Brickley continued with his Opinion stating:

> We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may

be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully evaluate his fitness to practice law....In accord with this decision, even though five years have elapsed since petitioner's disbarment, we find that he is not eligible for reinstatement and would impose this additional period of time to review his fitness. (Appd p. 12a-13a)

* * *

We therefore would reject petitioner's application for reinstatement and would hold that he may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. We therefore would reverse the decision of the Attorney Discipline Board. (Appd p.14a)

The dissent would affirm the Order of Reinstatement. Justice Levin writes:

McWhorter provided ample evidence in support of the hearing panel's and board's determination. The record read as a whole, demonstrates that McWhorter has the moral and professional fitness to practice law again in this state. (Appd p. 21a)

* * *

In emphasizing the seriousness of the underlying offenses committed by McWhorter, the majority ignores other relevant factors that should be considered in

deciding whether to order reinstatement.

* * *

By requiring McWhorter to wait additional time before reapplying, the majority summarily discounts what is indisputably a solid record of rehabilitation since release from prison under the guise that McWhorter was required to comply with parole regulations. This approach ignores the quality of the substantial evidence presented to the hearing panel and the Attorney Discipline Board.

Finally, I agree with Justice Cavanagh that the imposition of a five-year period from release from parole supervision should be done only by court rule under the Court's rule-making authority. By creating this new requirement at this time, the majority avoids the publication and comment procedure and deprives the profession of an opportunity to comment and suggest alternative approaches. (Appd p. 22a)

Neither the majority nor the dissent addressed the issues of due process, equal protection, ex post facto, or double jeopardy, although the first two issues were argued by Petitioner on appeal as it pertained to permanent preclusion. Petitioner filed a Motion for Rehearing presenting the issues of due process, ex post facto, double jeopardy and denial of equal protection. On September 19, 1995, the Michigan Supreme Court denied rehearing by a 4-3 vote with Justice Mallett, co-author of the Brickley Opinion, Justice Cavanagh and Justice Levin dissenting. (Appd p. 35a)

## REASON FOR GRANTING WRIT

The essence of law is its predictability. Law is the statement of rules and principles expected to be observed; the blue print for conduct. The essence of due process is fair play. Galvan v Press, 347 US 522, 530, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954). The decision of the Michigan Supreme Court, in the instant case, invalidates these principles. It stands for the proposition that a state supreme court may, retroactively, without regard to fairness, change the rules and defeat the rights of a party who has conformed his conduct to the existing rules.

There are several reasons for granting this writ. The decision of the Michigan Supreme Court: (1) violates the Ex Post Facto Clause, Art. I§10, of the U.S. Constitution. It is the application of a new punitive measure to a crime already consumated; (2) violates the double jeopardy provision of the 5th Amendment of the Constitution. It imposes a civil sanction that cannot be said to, soley, serve a remedial purpose, but rather is punishment as we know it; (3) lacks even an element of basic fairness, addresses an issue [eligiblity] that was never briefed, never argued and never heard, gives the appearance of impropriety and violates the state constitution, state statutes and the court's own rules in a manner and for reasons that contravene the due process clause of the 14th Amendment and (4) clearly applies a different rule to Petitioner than had been applied all other Michigan lawyers under same or similiar circumstances and improperly delegates judicial authority to Respondent in violation of the equal protection clause of the 14th Amendment.

**Ex Post Facto**

In In Re Ruffalo, 390 US 544, 88 S.Ct. 1222, 20 L. Ed.2d 117, (1968), this Court stated: "Disbarment, designed to protect the public, is a punishment or penalty imposed upon the lawyer" and "quasi-criminal in nature". In Cal. Dept. of Corrections v Morales, 514 U.S. __, 115 S. Ct. __, 131 L. Ed. 2d 588 (1995), citing Calder v Bull, 3 Dall 386, 1 L. Ed. 648 (1798) and Beazell v Ohio, 269 U.S. 167, 46 S. Ct. 68, 70 L. Ed. 216 (1925), this Court stated that the Ex Post Facto Clause of Article 1 §10 was "aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" In Morales this Court reaffirmed the proposition in Lindsey v Washington, 301 US 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937), that the constitution "forbids the application of any new punitive measure to a crime already consummated."

In Bouie v Columbia, 387 US 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964), this Court applied the Ex Post Facto Clause to actions of a state supreme court stating:

> An ex post facto law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action'; or that 'aggravates a crime, or makes it greater than it was when committed'. (citations omitted) If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

In 1981, when Petitioner's license was revoked, the penalties for his misconduct were fixed by court rule. Among those penalties was the rule that Petitioner was ineligible to reapply for his license for five years. (Appd p.109a) In 1994, the Michigan Supreme Court reaffirmed this punishment. The court, however, went one step further and stated that if an attorney had been denied reinstatement after the passage of five years, that attorney could reapply for reinstatement in six months. (Appd p.99a) In this case, without amending or abolishing the aforementioned rules, the court, retroactively, extended Petitioner's punishment. The court stated that Petitioner could not apply for reinstatement until five years after the termination of penal supervision. Further, to enforce this prohibition, the court, in derogation of the six month rule, specifically held that Petitioner could not reapply until the end of June, 1997, more than fifteen years after his license revocation. By any definition, this is an increase in the penalty applied to this Petitioner.

In Landgraf v USI Film Prods, __ US__ 114 S.Ct. 1522, 128 L. Ed. 2d 299 (1994), this Court stated that the Ex Post Facto Clause is intended to not only insure that individuals have fair warning about the effect of criminal statutes but also to restrict governmental power by restraining arbitrary and potentially vindictive legislation. The rule making power of the court, as it pertains to attorney discipline and reinstatement, is legislative. In the instant case, the court's agent and employee, Respondent did not request that all similarly situated attorneys be permanently disbarred, but asked only that Petitioner be permanently disbarred. Through a form of circuitous reasoning, this arbitrary and capricious request was administratively legislated in its decision.

The court, through its new rule, held that Petitioner could not be reinstated because Petitioner was under "supervision", regardless of the extent of that supervision and states that Petitioner's post penal supervision period of three years could not be considered because of "heightened scrutiny" while reapplying for his license. By implication, this is permanent disbarment, contrary to existing Michigan court rule and contrary to the punishment imposed upon Petitioner at the time of his conviction and the revocation of his license. Under this rationale, Petitioner could never demonstrate his rehabilitation.

The new rule created by the supreme court's decison is clearly an increase in the punishment set by court rule at the time of the "quasi-criminal" disbarrment proceedings. It is further an increase in the punishment rendered to Petitioner as a result of his criminal conviction. Under either circumstance the new rule, as applied, in ex post facto.

**Double Jeopardy**

In U.S. v Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), this Court held that a civil penalty may constitute double jeopardy. In Halper, this Court said:

> In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties.(cite omitted) The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the

purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads. (citation omitted) ([T]he labels affixed either to the proceedings or to the relief imposed... are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law') To that end, the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. **Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.**

These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. (cite omitted) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." (cite omitted) **From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.** (Emphasis added)

The new rule, as retroactively applied, served no remedial purpose. It was not advocated by the court as remedial. The court made that clear when it indicated that the three years since termination of parole could not be considered because Petitioner had been applying for reinstatement. Three of the concurring opinions concurred only because the new rule precluded Petitioner from immediate reinstatement and those justices advocated permanent preclusion, retroactively applied. Under Halper, this is punishment, retroactively applied, constitutes double jeopardy.

**Due Process**

Under Michigan General Court Rule 972, (Appd p.109a) in effect at the time of Petitioner's disbarment, Petitioner was eligible to apply for reinstatement after five years. This eligibility was reaffirmed in the court rules of 1985 and as amended in 1994. (Appd p.97a-100a)

The hearing panel and Attorney Discipline Board noted that Petitioner was eligible to apply for reinstatement in 1986. Petitioner, instead, waited six years after he became eligible for reinstatement to re-earn his good name and reputation.

Petitioner did all that the law required for reinstatement. He rebuilt his good name, his reputation, and demonstrated his honesty, reliability and trustworthiness. He paid the fees and costs to apply for reinstatement including attorney fees, went through four days of public hearings plus a supplemental hearing, appealed to the Attorney Discipline Board and Petitioner took and passed the Michigan Bar Examination.

The hearing panel and the Attorney Discipline Board found that Petitioner had established "by clear and

convincing evidence that he should be reinstated to the practice of law." (Appd p.45a, 67a) Despite these findings, Petitioner was denied reinstatement by the Michigan Supreme Court based on a new rule, retroactively applied, in a results based decision.

As set forth by the hearing panel: "**the court rules have at all times since his disbarment led the petitioner to believe that he could file a petition for reinstatement after five years.**" (Appd p. 67a) As noted by the Attorney Discipline Board, Respondent did not "challenge the panel's factual findings as to...eligibility requirements...for example whether five years have elapsed since revocation."(Appd p.43a)

This Court and the Michigan Supreme Court have repeatedly held that they will not consider questions not raised and passed upon in a court below. Springer v U.S., 102 US 586, 26 L.Ed. 253 (1880); Poelman v Payne, 332 Mich 597; 52 NW2d 229 (1952). The issue of eligibility was never raised by Respondent. The right of prior notice and hearing is central to due process. Parham v Cortese, 407 US 67, 92 S.Ct. 1983, 32 L.Ed 2d 556 (1972). The issue of eligibility to apply for Petitioner's license was never briefed, never argued, and never heard. Further, the Michigan Supreme Court certified through its clerk and its employee, the Grievance Administrator, that Petitioner was eligible for reinstatement in 1992.

Respondent is the employee of the court. In that capacity, Respondent meets with the court to discuss attorney discipline including reinstatements. Neither Petitioner nor his counsel, nor any other attorney involved in disciplinary or reinstatement proceedings may meet with the court, ex parte. The Due Process Clause entitles a person to an

impartial and disinterested tribunal in both civil and criminal cases. Marshall v Jerico, 446 US 238; 100 S. Ct. 1610, 64 L.Ed. 2d 812 (1980). Under the Michigan procedure, it is impossible to discern when the court is functioning administratively and when it is functioning judicially. Due process requires a separation between those who enforce the law and those who adjudicate the law. The relationship of master and servant defeats due process or at the very least, gives the appearance of impropriety.

In Schware v Board of Bar Exam. of State of New Mexico, 353 US 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957), this court stated that:

> A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the 14th Amendment. (citations omitted) A state can require high standards of qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with applicant's fitness or capacity to practice law.

Under Article 6 §28 of the Michigan Constitution of 1963, the Michigan Supreme Court does not have de novo review of reinstatement proceedings. State Bar Grievance Administrator v Estes, 390 Mich 585; 212 NW2d 903 (1973). As set forth in In Re: Freedman 406 Mich 256, 277 NW2d 635 (1995), In Re: Grimes, 414 Mich 483, 326 NW2d 380 (1982) and Grievance Administrator v August, 438 Mich 296, 475 NW2d 256 (1991), "the findings of the Hearing Panel and Attorney Discipline Board are to be

reviewed for proper evidentiary support on the whole record." (Appd p. 81a) Respondent nor the court contested that the hearing panel and Attorney Discipline Board lacked evidentiary support for their findings that Petitioner was currently fit to again practice law.

The "substantial evidence" requirements of Article 6, §28 to uphold an administrative determination has been construed by the Michigan courts as "more than a mere scintilla but somewhat less than preponderance." Farmers Bank of Concord v Dep't of Comm. Financial Inst. Bur., 77 Mich App 313, 258 NW2d 496 (1977). Because the court could not directly attack the decisions of the hearing panel and Attorney Discipline Board, the court changed the rules and the new rule had nothing to do with fitness, moral character or capacity to practice law.

Michigan, by statute, Michigan Compiled Laws 338.41-338.47, has expressed its desire that convicted offenders assume "the responsibilities of citizenship" and not be deterred in their attempts to "occupational or professional" licenses. MCL 338.42 provides that: "A license shall not be denied solely on the basis of prior misdemeanor or felony conviction unless it is related reasonably and adversely to the ability to serve the public in the licensed area." (Appd p.82a) The supreme court's decision in the instant case, is in contravention of the intent of this statute. Petitioner's parole status is not "reasonably and adversely" related to Petitioner's ability to serve the public.

Respondent argued below that a license to practice law "is a privilege bestowed by the state." In Schware, supra, this court made clear that the "practice of law is not a matter of the State's grace." This Court has also held that there is a right to follow a chosen profession free from

unreasonable governmental interference and that such right comes within the "liberty" and "property concepts of the 5th Amendment." U.S. v Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed. 2d 508 (1967). Petitioner contends not that he had a right to practice law but that he had a vested right to apply and if he met the stated qualifications, that his license would be reinstated.

In 1994, only eight months before its decision in the instant case, the Michigan Supreme Court amended its court rules regarding eligibility for reinstatement to include an expressed provision that an attorney whose license to practice law had been revoked was eligible to apply after five years, (Appd p.98a-99a) and expressly stated that if the attorney were denied reinstatement he could file a new petition for reinstatement six months later. In the instant case, the court abrogated both rules and only applied the new rule to attorneys convicted of a crime and placed on some form of penal supervision. Further, without hearing or notice, the Michigan Supreme Court withdrew its 1992 certification of eligibility.

In Rio Grand Irrigation & C. Co. v Guildersleeve, 174 US 603, 19 S. Ct. 761, 43 L. Ed. 1103 (1898), this court held:

> A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and can not be dispensed with to suit the circumstances of any particular case... The courts may rescind or repeal their rules without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification

must be applied to all cases which come within it, until it is repealed by the authority which made it.

The Michigan Supreme Court tries to analogize the five year extension of eligibility for Petitioner to the initial five year requirement under MCR 9.123 (Appd p.97a) on the grounds that Petitioner could not demonstrate trustworthiness because of supervision. However, in a footnote, the court states that the three year lapse since the end of parole supervision could not be considered because Petitioner was under the supervision and restraints of applying for his license. This is a circuitous argument. Petitioner, under this reasoning, will never be able to establish his eligibility because it will always be alleged that he was under some form of supervision while waiting to reapply.

The actions of the Michigan Supreme Court directly contradict this Court's statements in Willner v Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963), wherein this Court said that the requirements of fairness "extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." In effect, the Michigan Supreme Court, after the entire reinstatement procedure had been completed retroactively, by decision, amended its court rules. However, in order to formulate the new rule, the Michigan Supreme Court violated its own rule regarding amendments, particularly as it related to notice and comment.(Appd p.85a)

It is true that the court rule providing for amendment states that the court may "dispense with the notice requirements of this rule if it determines that there is a need for immediate action." As written, the rule implies an emergency. There was no emergency. The only immediate

action was to keep this particular petitioner from being reinstated to the practice of law, retroactively.

As this Court stated, in Matthews v Eldridge, 424 US 319, 96 S.Ct 893, 47 L.Ed.2d 18 (1976), due process is not a technical conception with fixed content unrelated to time, place and circumstances but is flexible and calls for such procedural protections as a particular situation demands. The creation of a new rule and retroactively applying that rule after nearly three years of hearings, tests, expense and hardship, is not due process.

Article 6, §1 of the Michigan Constitution vests the judicial power of the state in one court of justice which is divided into the supreme court and the inferior courts. Article 6, §5 of the Michigan Constitution empowers the supreme court to make "general rules establish, modify, amend, and simplify the practice and procedure in all courts of this state." (Appd p. 81a) The Michigan Supreme Court, through court rule, established its procedure and created the administrative agency that exists today. As set forth in Rio Grand Irrigation, supra, the procedure established by the court is binding on the court as well as upon the parties. The court can not do indirectly that which it can not do directly without violation of due process.

**Equal Protection**

In support of its opinion denying reinstatement and the new rule, the Michigan Supreme Court relies on its order granting peremptory reversal in Matter of Callanan, 440 Mich 1207, 487 NW2d 750 (1992), wherein the court, without hearing or argument stated:

> The misconduct that led to the revocation of petitioner's license to practice law was substantial and, because the petitioner had

> spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission.

Peremptory reversal orders have become common place in Michigan as noted in the dissent.

What the court did not state in its 1992 order was that Callanan had not established that he was, in fact, off parole. What the court did not disclose in the instant case, was the fact that Callanan, immediately after the court's order, filed a new application for reinstatement, was reinstated and has been practicing law for approximately two years. Under the rule in this case, Callanan would not have been eligible to apply for reinstatement until months after he had already been practicing law.

A hundred or more lawyers have been disbarred or suspended, placed on some form of penal supervision and reinstated in the State of Michigan between Petitioner's license revocation in February, 1981, and the court's new rule on July 5, 1995. The new rule applies only to lawyers placed on penal supervision, but does not apply to lawyers who are incarcerated or those who were suspended or revoked for criminal misconduct but fortunate enough not to be prosecuted. The classification is arbitrary with no rational basis.

Respondent asks the Michigan Supreme Court to permanently preclude Petitioner from the practice of law although such preclusion did not exist at the time of Petitioner's criminal conviction or license revocation. In response to a question by the court, Respondent admitted that

it could not think of an instance where an attorney in Michigan had been permanently disbarred.

Petitioner acknowledges that exact equality is not a prerequisite for equal protection. Norvel v Illinois, 373 Mich 420, 83 S.Ct 1366; 10 L.Ed. 2d 456 (1963). However, the purpose of equal protection is to rest the rights of all persons upon the same rule under similar circumstances. Frost v Corp. Com. of Okla., 278 U.S. 515, 49 S.Ct. 235, 73 L.Ed. 483 (1929).

There was a discriminatory purpose in the decision of the Michigan Supreme Court. It was intended to thwart, discourage and prevent this particular Petitioner from being reinstated into the practice of law and consequently, those attorneys who thereafter were placed on some form of penal supervision. As stated, the Opinion did not address those disbarred attorneys who were incarcerated, or who were disbarred for severe misconduct but fortunately not criminally sanctioned. In McCleskey v Kemp, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), this Court said that where the decision maker selects or reaffirms a particular cause of action, at least in part because of its adverse affect on an identifiable group, it is a violation of equal protection.

Petitioner acknowledges that the 14th Amendment guarantees equality of laws, not equality of results, Massachusetts v Feeny, 442 US 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979). However, in the instant case, the law mandated one action and the court took another.

The Equal Protection Clause commandment that no state shall deny any person within its jurisdiction the equal protection of laws is essentially a direction that all persons similarly situated should be treated alike. City of Celburne,

Tex. v Celburne Living Center, 473 US 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985). A hundred or more Michigan lawyers were similarly situated to Petitioner between 1986 and 1995. All had had their licenses suspended or revoked for criminal or gross civil misconduct, many of whom were placed on some form of penal supervision. Not one of these "similarly situated" attorneys was denied reinstatement because of his supervision status. All "similarly situated" who so desired were permitted to seek reinstatement within the time set forth by the court rule, all except Petitioner.

A minority of the court would have retroactively applied a rule permanently precluding Petitioner from the practice of law. Although, Respondent admitted to the court that no attorney in Michigan history had been permanently precluded. Respondent concluded its argument asking the court to permanently preclude only this Petitioner. The adverse affect sought by the employee and agent of the Supreme Court of Michigan was a course of action designed to have an adverse affect on an identifiable group of one, Petitioner. This is a denial of equal protection.

As stated above, the relationship between Respondent and the court is that of master-servant. Respondent meets with the court in administrative meetings regarding attorney discipline on a regular basis. The rule as adopted by the supreme court in this case, is not self-enforcing. It relies on the decision of Respondent.

Michigan Court Rule 9.124 requires an applicant seeking reinstatement to file his application with the clerk of the supreme court, with the Grievance Commission and the Attorney Discipline Board. The clerk of the supreme court verifies when the applicant's license was revoked or

suspended. If the requisite time under MCR 9.124 has passed, the supreme court clerk notifies the Commission and the Discipline Board that they may proceed. The clerk of the supreme court has no knowledge nor does the Discipline Board whether the applicant was placed on some form of penal supervision. This allows Respondent to determine if the issue will be raised in the first instance and whether Respondent, unilaterally, will enforce the new rule. Only Respondent can appeal a hearing panel conclusion. If the issue of penal supervision is not raised in the hearing by Respondent, it is a non-issue and therefore a non-barrier to reinstatement.

The Michigan Supreme Court in the six months since its decision, has not acted to change the written rules to incorporate this unusual sanction. As set forth above, it has delegated to Respondent, its employee and agent, a degree of latitude that denies equal protection.

The co-author of the new rule, Justice Mallett, voted for rehearing when the issues presented above were brought to his attention, as did Justice Cavanagh and Justice Levin. Their votes speak loudly as to why this Court should grant the Writ of Certiorari.

## CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.



Robert A. McWhorter
Petitioner

Michigan Supreme Court
Lansing, Michigan 48909

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Syllabus

| Chief Justice | Justices |
|---|---|
| James H. Brickley | Charles L. Levin |
| | Michael F. Cavanagh |
| | Patricia J. Boyle |
| | Dorothy Comstock Riley |
| | Conrad L. Mallett, Jr. |
| | Elizabeth A. Weaver |

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**This syllabus was prepared by the Reporter of Decisions.**

Reporter of Decisions
William F. Haggerty

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*In re* PETITION FOR REINSTATEMENT OF ROBERT A McWHORTER

Docket No. 99848. Argued March 8, 1995 (Calendar No. 14). Decided July 5, 1995.

The Attorney Grievance Commission filed a formal complaint with the Attorney Grievance Board against Robert A. McWhorter after he was found guilty in federal court of aiding and abetting the manufacture of methamphetamine. The petitioner subsequently was disbarred; however, the order of disbarment was vacated after the United States Court of Appeals for the Sixth Circuit vacated the district court's decision and remanded the case for trial. Meanwhile, the petitioner was convicted in the Kalamazoo Circuit Court of kidnapping and conspiracy to kidnap. A second formal

complaint was filed, and his license to practice law was revoked as a result of those convictions. After remand on the federal charges, the petitioner was convicted by a jury of drug-related offenses and was sentenced to ten years imprisonment with a two-year special parole term. The United States Court of Appeals for the Sixth Circuit affirmed, 705 F2d 459 (CA 6, 1982).

On June 28, 1992, the petitioner was released from federal parole. Three months before being released, he petitioned for reinstatement of his license. The tri-county hearing panel determined that the petitioner had established the requirements for reinstatement pursuant to MCR 9.123(B) by clear and convincing evidence and reinstated him with certain conditions. The Attorney Grievance Commission sought review before the Attorney Discipline Board. The petitioner filed a cross petition, requesting that the conditions imposed by the hearing panel be removed. The Attorney Discipline Board remanded the case to the hearing panel, stating that there was insufficient evidence in the record to evaluate the nature and scope of the supervision of federal authorities. Thereafter, the board concluded that the monitoring of the petitioner by parole authorities was minimal and issued an order modifying the hearing panel's order of reinstatement and reinstated the petitioner and removed the conditions imposed. The Attorney Grievance Commission appeals.

In separate opinions, the Supreme Court *held:*

The petition for reinstatement must be denied, and the petitioner may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

Chief Justice Brickley, joined by Justice Mallett,

stated that a review of the entire record does not support the decision of the hearing panel or the Attorney Discipline Board to reinstate the petitioner to the practice of law in this state at this time. The petitioner has not spent adequate time outside the supervision of parole authorities sufficient to demonstrate that he has a proper understanding of and attitude toward the standards imposed on members of the bar or that he will conduct himself in conformity with those standards.

To be eligible for reinstatement to the practice of law, a petitioner must prove by clear and convincing evidence satisfaction of the criteria of MCR 9.123(B)(1) to (7). Where, as in this case, reinstatement of an attorney involves an analysis of subrules 6 and 7, a balancing of several factors is required, such as whether the petitioner has spent sufficient time outside the supervision of parole authorities to clearly and convincingly establish satisfaction of the requirements of the subrules. No single factor is conclusive; each must be evaluated in light of the others.

In this case, the petitioner has not spent sufficient time away from the authority of parole officers to demonstrate by clear and convincing evidence that he safely may be recommended to the public, the Courts, and the legal profession as a person fit to be consulted by others or to represent them and act in matters of trust and confidence. MCR 9.123(B)(7). Sufficient time has not passed in order that he may demonstrate a proper understanding of and attitude imposed on members of the bar under MCR 9.123(B)(6).

Justice Riley, joined by Justice Boyle, concurring, joined in the imposition of a five-year waiting period following a period of parole supervision in the absence of a

majority recognition of permanent disbarment with no opportunity ever to reapply, although the record calls for the permanent disbarment of the petitioner.

Reversed.

Justice Weaver, concurring in the result only, stated that the petitioner should be permanently disbarred because the facts that led to his suspensions from practice, disbarment, and criminal convictions can leave no doubt that he cannot be safely recommended to the public, the courts, and the legal profession. No matter what duration of disbarment is imposed, the conduct that led to it will not change; the totality of the petitioner's conduct cannot be ignored. The finality of permanent disbarment is in the best interests of the public, the courts, the legal profession, and the petitioner.

Justice Cavanagh, concurring, stated that a published opinion is not the appropriate vehicle to set a minimum spacing of five years between subsequent petitions for reinstatement of disbarred attorneys. Rather, the proper way to effect such change is amendment of the court rules.

Justice Levin, dissenting, stated that the order of reinstatement should be affirmed. The length of time following disbarment and unsupervised release into society, in addition to the seriousness of the underlying misconduct, is relevant to the determination whether and when, if at all, a disbarred lawyer should be reinstated. In most jurisdictions reinstatement is possible, even in egregious circumstances, unless a court rule or law precludes reinstatement. In this case, sufficient time has elapsed since McWhorter's offense and his release from incarceration to determine his moral fitness to practice law. Requiring him to wait five years to reapply serves little or no useful purpose. Further, the

imposition of a new five-year period from release from parole supervision should be done only by court rule.
1995 State of Michigan

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Opinion

BEFORE THE ENTIRE BENCH
BRICKLEY, C.J.

In this case we decide whether the decisions of the tri-county hearing panel and the Attorney Discipline Board to reinstate petitioner's license to practice law are supported by proper evidence on the whole record. We believe that a review of the entire record doer not support the decision of the hearing panel or the Attorney Discipline Board to reinstate petitioner Robert McWhorter to the practice of law in this state at this time. We conclude that petitioner has not spent adequate time outside the supervision of parole authorities sufficient to demonstrate that he has a proper understanding of and attitude toward the standards imposed on members of the bar or that he will conduct himself in conformity with those standards. We therefore would reverse the decision of the Attorney Discipline Board and deny Mr. McWhorter's petition for reinstatement, and would hold that petitioner may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

In December 1978, Robert McWhorter was found guilty in federal court of a ten-count indictment for the offense of aiding and abetting the manufacture of methamphetamine. 21 USC 841(a)(1), 18 USC 2(a), and 21 USC 841(b)(1)(B). He was sentenced to five years

imprisonment with a special parole term of two years. As a result of this conviction, the Attorney Grievance Commission filed a formal complaint against petitioner in January, 1979.[1] Petitioner was disbarred by order filed June 8, 1979. However, the order of disbarment was later vacated by notice dated September 15, 1980, because the United States Court of Appeals for the Sixth Circuit vacated the decision and remanded the case for trial.[2]

Meanwhile, petitioner was convicted in Kalamazoo Circuit Court on May 29, 1980, for an unrelated incident of kidnapping, MCL 750.349; MSA 28.581, and conspiracy to kidnap, MCL 750.157a; MSA 28.354(1). As a result, a second formal complaint was filed on June 20, 1980, charging petitioner with violation of GCR 1963, 953 (2) to (5), and Canon 1 of the Code of Professional Responsibility, DR 1-102 (A)(3) and (4). The convictions arose out of the abduction of David Nixon from McWhorter's law office. The kidnapping was arranged in order to extort money for the payment of McWhorter's legal services. Petitioner's license to practice law was ultimately revoked, effective February 24, 1981, as a result of these convictions.

After remand on the federal charges, on October 3, 1980, petitioner was convicted of drug-related offenses in the United States District Court for the Western District of Michigan, Southern Division. A jury found petitioner guilty of conspiracy to import cocaine into the United States, aiding and abetting the manufacture of methamphetamine, and using a communication facility, i.e., a telephone, to facilitate the manufacture of methamphetamine. The jury also convicted Mcwhorter of conspiracy to manufacture, possess with intent to distribute, and distribute methamphetamine. 21 USC 841(a)(1). Petitioner was sentenced to ten years

imprisonment with a two year special parole term.[3]

The federal convictions arose out of petitioner's attempt to finance a drug-smuggling trip to South America to purchase cocaine and marijuana. McWhorter and an undercover Drug Enforcement Administration agent met and discussed McWhorter's drug-smuggling scheme and his contacts with various drug sources. The DEA agent told McWhorter that he was interested in chemical drugs, and McWhorter responded that he knew a chemist who would manufacture drugs. Additionally, McWhorter offered to render legal services to the undercover agent, proposing to set up a strawman chemical company in order to make detection of the drug scheme more difficult. On appeal, McWhorter contended that he was involved in only one drug conspiracy, i.e., the manufacturing of methamphetamine in order to finance the South American drug-smuggling scheme. The United States Court of Appeals for the Sixth Circuit rejected his argument and affirmed the convictions.[4]

Petitioner served prison terms for both his federal and state convictions. He was released on parole in 1985 and sent to a halfway house in Grand Rapids for the following two months. On June 28, 1992, he was released from federal parole. Approximately three months before being released from federal parole, petitioner filed a petition for reinstatement of his license to practice law in Michigan.

A hearing was held by the tri-county hearing panel and it was determined that petitioner had established the requirements for reinstatement pursuant to MCR 9.123(B) by clear and convincing evidence. Petitioner was therefore reinstated with conditions, including payment of expenses, continuance of weekly therapy sessions, maintenance of church activities, and monitoring by a licensed attorney every

two months for one year.

The Attorney Grievance Commission filed a petition for review of the hearing panel's decision with the Attorney Discipline Board. Petitioner filed a cross petition for review, requesting that the conditions imposed by the hearing panel be removed. The Attorney Discipline Board remanded the case to the hearing panel, stating that there was not "sufficient evidence in the record upon which to evaluate the nature and scope of the 'supervision of federal authorities' . . . ." In May, 1994, the Attorney Discipline Board concluded that the monitoring of petitioner by parole authorities war minimal and issued an order modifying the hearing panel's order of reinstatement. The Attorney Discipline Board reinstated petitioner and removed the conditions imposed by the hearing panel. The Attorney Grievance Commission filed an application for leave to appeal, requesting review of the Attorney Discipline Board's decision. We granted leave to appeal[5] and now reverse.

II

We review the decision of the hearing panel and the Attorney Discipline Board "for proper evidentiary support on the whole record."[6] Grievance Administrator v August, 438 Mich 296, 304; 475 NW2d 256 (1991).[7] We simultaneously recognize that"[t]he power to regulate and discipline members of the bar rests ultimately with this Court pursuant to constitutional mandate." Id.at 304.[8] A license to practice law is "a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of justice as an attorney and counselor and as an officer of the court." MCR 9.103(A).Cognizant of this responsibility, we review the decisions of the hearing panel and the Attorney Discipline

Board to reinstate petitioner to determine if they are supported by the record as a whole.

A

In order to be reinstated, petitioner must establish that he is eligible for reinstatement by clear and convincing evidence by proof that he has satisfied the criteria set forth in MCR 9.123(B)(1) to (7):[9]

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct Since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court . . . .

The record appears to support both the hearing panel's and the Attorney Discipline Board's determination

that petitioner has complied with subrules 1 to 5. We are therefore concerned only with whether the record as a whole supports the conclusion that petitioner has established the requirements set forth under subrules 6 and 7. [10]

We initially note that the decision whether to reinstate a disbarred attorney is a balancing process. Moreover, we conclude that a proper analysis of subrules 6 and 7 requires the balancing of several factors.[11] In reviewing the various factors, we recognize that no one factor is conclusive, but, rather, each must be evaluated in light of the others. Specifically, we must consider whether petitioner has spent sufficient time outside the supervision of parole authorities and convincingly establish that he has satisfied the requirements of subrules 6 and 7.

B

The passage of time, by itself, is not be sufficient to support reinstatement.[12] The relevant inquiry is whether petitioner has spent an appreciable time outside the supervision of parole authorities in order for the hearing panel to fully evaluate the disbarred attorney's prevent ability to comport with the fitness requirements. See In re Reinstatement of Callanan, 440 Mich 1207; 487 NW2d 750 (1992); see also August, supra. Moreover, the five-year period after which a disbarred attorney may petition for reinstatement is but "a minimum period in which rehabilitation may occur following revocation of the license to practice law; the passage of five years in no way guarantees eligibility for reinstatement." Id. at 310. In Callanan, supra at 1207, this Court held by order that "[t]he misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision

of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission."

In August, an attorney was disbarred after he was convicted of attempting to defraud the United States by conspiring with a court clerk in the United States Bankruptcy Court for the Eastern District of Michigan to manipulate the blind-draw system of assigning judges.[13] In an attempt to avoid a judge known to carefully examine and reduce attorney fee awards, August and the clerk arranged the assignment of judges so that August's firm avoided the judge in a significant number of cases.

August was imprisoned for approximately one year and was transferred to a halfway house. He remained there until November 19, 1985, when the district judge reduced his sentence to time already served. August filed a petition for reinstatement of his license to practice law in October, 1988. The Wayne County hearing panel denied his request. The Attorney Discipline Board held that August was eligible for reinstatement. 438 Mich 302-303. On appeal to this Court, we remanded the case to the Attorney Discipline Board to reexamine whether the petitioner could be recommended to a position of trust as a member of the bar. Significantly, we held that the hearing panel is not limited to a choice between reinstatement and permanent disbarment. Rather, we stated that a third alternative exists where it is determined that a sufficient period of time has not elapsed to judge whether the petitioner may be recommended for reinstatement.[14]

Petitioner in the present case applied for reinstatement three months before his release from his federal parole. The Attorney Discipline Board remanded the case to the hearing

panel to determine the nature and scope of the federal parole authorities' supervision. The board held that petitioner was not subject to rigid authority during his final period of parole.[15] However, the critical consideration is not the extent of supervision, but rather the fact that petitioner was under the supervision of parole authorities at the time he applied for reinstatement. Although in these proceedings the nature and scope of supervision may be relevant, the mere fact that petitioner had not been away from the supervision of parole authorities greatly influences the determination whether he has sincerely and sufficiently demonstrated that he will be able to understand and operate within the standards of the bar. Therefore, it is only after a petitioner has spent sufficient time outside the control of parole officers that the hearing panel or the Attorney Discipline Board is able to determine whether the petitioner has been rehabilitated and may safely therefore be recommended for reinstatement. Although he may not have been subject to strict scrutiny by parole authorities, petitioner was still serving his parole and, upon petition for reinstatement, must demonstrate his honorable behavior outside such authorities for a period that would enable this Court to safely recommend him to the public.16 To prevent the petitioner's immediate reapplication in the present case, we hold that petitioner is not eligible for reinstatement until June 28, 1997, five years from the date of his release from federal parole.

We borrow this time span from MCR 9.123 and analogize it to the present case. For the same reasons, five years is the minimum period after which a disbarred attorney may be eligible for reinstatement, we would hold that it is a sufficient period outside the supervision of parole authorities and the contemplation of petition for reinstatement to fully

evaluate his fitness to practice law. In August, supra at 310, this Court stated that five years was the minimum time in which a petitioner could apply for reinstatement, but in no way guaranteed eligibility for reinstatement. In accord with this decision, even though five years have elapsed since petitioner's disbarment, we find that he is not eligible for reinstatement and would impose this additional period of time to review his fitness. We are persuaded that this addresses the problem identified by one commentator: "The disbarred attorney may file another petition at a later date. In light of this, it would be helpful if the rules provided a minimum spacing between subsequent petitions to prevent a lawyer whose petition is denied from immediately filing another petition." Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 579, author's comment to MCR 9.123.

We further note that petitioner should not automatically be entitled to reinstatement at the expiration of five years; it is merely the minimum time before he should be permitted to apply for reinstatement because more time may be demonstrate his fitness. August, supra. If petitioner chooses to petition again for reinstatement after the specified date, he would be subject to a full review, including consideration whether he should be subject to permanent disbarment.

III

We conclude that petitioner has not spent sufficient time away from the authority of parole officers to demonstrate by clear and convincing evidence that he may be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others or to represent them and act in matters of trust and confidence. MCR 9.123(B)(7). Nor has sufficient time passed in order

that he may demonstrate a proper understanding of and attitude imposed on members of the bar pursuant to MCR 9.123(B)(6). We therefore would reject petitioner's application for reinstatement and would hold that he may not reapply for reinstatement until June 28, 1997, five years from the date of his release from federal parole. We therefore would reverse the decision of the Attorney Discipline Board.

James H. Brickley
Conrad L. Mallett, Jr.

RILEY, J. (concurring)

We agree with Justice Weaver's assessment that this record calls for the permanent disbarment of Mr. McWhorter. However, in the absence of a majority recognizing the proposition that there should be "permanent" disbarment, with no opportunity ever to reapply, we join in the ruling of the lead opinion imposing a five-year waiting period following a period of parole supervision.

Dorothy Comstock Riley
Patricia J. Boyle

WEAVER, J. (concurring in the result only).

While I concur in the result of continuing disbarment reached by the lead opinion, I write separately because I would permanently disbar petitioner Robert McWhorter. The thorough recitation in the lead opinion of the facts that led to petitioner's suspensions from practice, disbarment, and

criminal convictions can leave no doubt that he cannot be safely recommended to the "public, the courts, and the legal profession."[1] Nor am I convinced that petitioner has now or ever will have a proper understanding of the attitude toward the standards that are imposed on members of the bar and will conduct himself . . . in conformity with those standards."[2]

This Court is charged with the responsibility of overseeing the conduct of the membership of the State Bar and has the power to "make any order it deems appropriate . . . . "[3] It has the power to impose, as proposed by the majority, an arbitrary waiting period before petitioner can file for reinstatement. However, what logic there is in imposing an arbitrary waiting period in this case is lost because petitioner will remain under our scrutiny and therefore will probably attempt to conform his conduct to our standards until he reaches his goal of readmittance.

No matter what the duration of petitioner's disbarment, the conduct that led to it will not change. While this petitioner was an attorney, he was convicted by a jury of conspiracy to import cocaine, unlawful manufacture of methamphetamine, using a telephone to facilitate the manufacture of methamphetamine, conspiracy to possess with intent to distribute methamphetamine, and kidnapping a client to extort money. Be used his legal training to set up a strawman corporation to conceal the drug conspiracies. Be had also previously been suspended for mishandling client funds. Regardless of the sympathy or compassion we may have for the situation petitioner McWhorter has made for himself, ever readmitting him to the Michigan State Bar would make a mockery of this Court's duty to protect the public and the profession.

I do not, however, believe that it is practical or advisable to attempt to enumerate types of conduct or categories of crimes that should automatically result in disbarment. This Court should continue to review petitions for reinstatement case by case. In this case, the totality of petitioner's conduct cannot be ignored. The finality of permanent disbarment is in the best interests of the public, the courts, and the legal profession. This finality will also allow petitioner to go forward with his life plans, knowing he need never consider practicing law in Michigan again.

Elizabeth A. Weaver

CAVANAGH, J. (concurring).

I agree with much of the lead opinion. For example, I agree that the petitioner has not spent enough time outside the supervision of parole authorities to demonstrate that he understands, and will conform to, the standards imposed on members of the bar. I agree that he cannot now be safely "recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence . . . ." MCR 9.123(B)(7). I also agree that it would be helpful if the rules provided a minimum spacing between subsequent petitions.

I write separately, however, because I do not feel that a published opinion is the appropriate vehicle to set that minimum spacing at five years. I do not necessarily disagree with the five-year ban; I merely believe that the proper way to effect the change is by amending the court rules. The same can be said regarding the issue of permanent

disbarment. If such a penalty is to be created, it should be done through the rule-making process provided in MCR 1.201.

The primary benefits of pursuing such a course are that it provides an opportunity for any interested parties to comment on the proposed changes, and it would let disbarred attorneys know exactly where they stand vis-a-vis reinstatement. Moreover, amending the court rules is superior to constantly interfering with the discretionary decisions of the Attorney Discipline Board each time we feel a wrong decision is made.

Michael F. Cavanagh

LEVIN, J. (dissenting).

The question presented is whether Robert A. McWhorter should be reinstated as a member of the state bar. McWhorter was disbarred following his convictions of federal and state crimes. The hearing panel ordered reinstatement with conditions. The Attorney Discipline Board affirmed.[1]

The majority concludes that McWhorter should not now be reinstated because sufficient time has not elapsed since he was under the supervision of parole officers. The majority imposes a five-year period after which McWhorter may reapply for reinstatement. I would affirm the order of reinstatement.

I

McWhorter was convicted in the United States District Court for the Western District of Michigan of conspiracy to import cocaine, unlawful manufacture of

methamphetamines, and conspiracy to distribute methamphetamines, and was sentenced to ten years imprisonment. In circuit court, McWhorter was convicted of kidnapping and conspiracy to kidnap, and was sentenced two to five years imprisonment.[2] He served the federal and state sentences concurrently in federal prison and was paroled in June, 1985. He remained on parole until June, 1992.

McWhorter was disbarred effective February 24, 1981. After his release from prison, he worked as an automobile salesman, and then started a legal research business. He petitioned for reinstatement in April, 1992, before completion of his parole. In April, 1993, the hearing panel reinstated McWhorter with conditions. These included continued psychotherapy, regular attendance at church, and supervision by a local attorney.[3] The panel majority said:

> [W]e are persuaded on the whole record, that Mr. McWhorter has established by clear and convincing evidence that he should be reinstated to the practice of law. Mr. McWhorter has become an active member of his church. He had been able to rebuild his relationship with his wife, daughter and son. He has established a productive business and appears to be handling the pressures associated with it. He has resumed a life in the community in spite of the opposition he has faced. [4]

The Grievance Administrator appealed the reinstatement order, claiming that McWhorter had failed to establish compliance with MCR 9.123(B)(6)[5] and (7)[6] by clear and convincing evidence and that sufficient time had not elapsed since McWhorter's release from parole to

properly judge his rehabilitation and fitness to practice law. In response to this Court's peremptory reversal in In re Reinstatement of Callanan, 440 Mich 1207 (1992), the board remanded this case to the hearing panel for further testimony concerning the nature and extent of McWhorter's supervision while on parole. In May, 1994, the board affirmed the hearing panel's order and eliminated the conditions.

The board, citing this Court's decision in Grievance Administrator v August, 438 Mich 296; 475 NW2d 256 (1991), observed that eleven years had elapsed between revocation of McWhorter's license and his petition for reinstatement, and more than fourteen years since McWhorter committed the acts that resulted in the convictions. Relying on its interpretation of August, the board rejected the Grievance Administrator's claim that the seriousness of McWhorter's crimes alone requires that he never be reinstated as a member of the state bar. It determined that sufficient time had elapsed to assess McWhorter's fitness to practice law, distinguishing the circumstances in the instant case from those presented in Callanan. The board concluded that the hearing panel's determination was based on ample evidence and "was an appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B)."

II

In August, supra, this Court held that "the nature of the offense and the time elapsed since its commission and since disbarment are relevant and important considerations in determining whether a disbarred attorney should be recommended to the position of public trust that is held by members of the Michigan State Bar."[7] Thus, "an attorney

may be denied readmission on the grounds that sufficient time has not passed to determine the present fitness of the applicant for readmission. Such a denial should not be deemed a permanent disbarment."[8]

In Callanan, following the August decision, the Court peremptorily reversed the board's reinstatement order, stating, "[t]he misconduct that led to the revocation of the petitioner's license to practice law was substantial, and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of this applicant for readmission."[9]

Both August and Callanan suggest that the length of time following disbarment and unsupervised release into society, in addition to the seriousness of the underlying misconduct, is relevant to the determination whether and when, if at all, the disbarred lawyer should be reinstated. The Grievance Administrator argues, and one of my colleagues would hold, that McWhorter's crimes should permanently prevent his reinstatement.[10]

In most jurisdictions reinstatement is possible, even in egregious circumstances, unless a court rule or law precludes reinstatement. The Washington Supreme Court ordered reinstatement in a case involving the misuse of client funds, stating,

> We have based this decision upon the longstanding doctrine of this court and of virtually every other jurisdiction that disbarment is not a permanent disability. Upon a proper showing of rehabilitation, an attorney may be reinstated.[11]

McWhorter provided ample evidence in support of the hearing panel's and the board's determination.[12] The record, read as a whole, demonstrates that McWhorter has the moral and professional fitness to practice law again in this state. In a similar case, In re Reinstatement of Wegner, 417 NW2d 97, 98 (Minn, 1987),[13] the petitioner had been convicted of conspiracy to smuggle marijuana in 1975, was disbarred in December, 1979, was released from prison in 1980, and entered treatment for alcoholism in 1982. In granting reinstatement, the Minnesota Supreme Court observed that the petitioner had acknowledged the wrongfulness of his conduct, the misconduct had occurred twelve years before the court's decision, and the petitioner had been released from prison for 7-1/2 years and had been chemical-free for five years. Further, the petitioner offered substantial evidence of a change for the better in character.[14] The court said:

> We recognize the severity of petitioner's prior misconduct. Indeed, we are not quick to reinstate a lawyer who committed such a reprehensible crime, which led to disbarment in the first instance. However, petitioner has demonstrated by clear and convincing evidence that he has had a change in his professional moral character. [15]

In emphasizing the seriousness of the underlying offenses committed by McWhorter, the majority ignores other relevant factors that should be considered in deciding whether to order reinstatement.

III

Sufficient time has elapsed since McWhorter's offense and his release from incarceration to determine his moral fitness to practice law, in compliance with MCR 9.123(B)

(7). McWhorter was convicted for acts that occurred over seventeen years ago, he was disbarred fourteen years ago, and was released from prison ten years ago. He has been free from parole supervision for almost three years. His parole officers reported that he fully complied with the conditions of parole. [16]

The majority concludes that "the mere fact that petitioner had not been away from the supervision of parole authorities [at the time of petitioning for reinstatement] greatly influences the determination whether he has sincerely and sufficient demonstrated that he will be able to understand and operate within the standards of the bar."[17] As other courts have concluded in similar circumstances, requiring McWhorter to wait five years to reapply at some future time serves little or no useful purpose.[18] It is undisputed that McWhorter complied with all the conditions of his parole and that no adverse incidents were reported by his parole officers. By requiring McWhorter to wait additional time before reapplying, the majority summarily discounts what is indisputably a solid record of rehabilitation since release from prison under the guise that McWhorter was required to comply with parole regulations. This approach ignores the quality of the substantial evidence presented to the hearing panel and the Attorney Discipline Board.

Finally, I agree with Justice Cavanagh that the imposition of a five-year period from release from parole supervision should be done only by court rule under the Court's rule-making authority. By creating this new requirement at this time, the majority avoids the publication and comment procedure and deprives the profession of an opportunity to comment and suggest alternative approaches.

[1] The formal complaint was dated January 10, 1979, charging petitioner with violation of GCR 1963, 953 (1) to (5), GCR 1963, 969, and Canon 1 of the Code of Professional Responsibility, DR 1-102 (A)(1), (3) to (6).

[2] Respondent remained suspended, however, as a result of an order of an Ingham County hearing panel filed on August 5, 1977. In that proceeding, petitioner was suspended from the practice of law for a period of 121 days for misconduct in handling client funds. This Court ultimately affirmed the order of discipline. State Bar Grievance Administrator v McWhorter (On Rehearing), 407 Mich 278, 282; 284 NW2d 472 (1979).

[3] Petitioner was released from federal parole on June 28, 1992.

[4] United States v McWhorter, 705 F2d 459 (CA 6, 1982).

[5] 447 Mich 1202 (1994).

[6] The record "must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding." MCR 9.122(D).

[7] See In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); In re Freedman, 406 Mich 256; 277 NW2d 635 (1979). See also State Bar Grievance Administrator v Estes, 392 Mich 645, 649-650; 221 NW2d 322 (1974), reviewing this Court's refusal to "substitute [its] judgment 'for that of the panel below which had an opportunity and a mandate not only to garner evidence of misconduct but to observe and assess the demeanor and credibility of the witnesses,"' citing State Bar Grievance Administrator v Estes, 390 Mich 585, 597; 212 NW2d 903 (1973).

[8] See Const 1963,art 6, § 5;See also Grimes, n7 supra at 489-490, stating"[i]t is this Court, however, that has ultimate responsibility to oversee the conduct of the... members of the State Bar, and to keep unsullied the reputation of the profession."

[9] We do not consider MCR 9.123(B)(8) and (9) because they are not applicable in the present case.

[10] Although each requirement under MCR 9.123(B) in interrelated, each subrule evaluates a different aspect of petitioner's eligibility. In this manner, we held in August, supra at 310 that subrule 6 is primarily directed to the question of the applicant's ability, willingness and commitment to conform to the standards required of members of the Michigan State Bar. Subrule 7 shifts the focus to the public trust which this Court has the duty to guard."

[11] Quoting In re Raimondi, 285 Md 607, 618; 403 A2d 1234 (1979), we have previously summarized this balancing process in August, supra at 307, stating:

> "On one side of the scale is placed the seriousness of the misconduct which produced disbarment and the court's duty to society at large to see that only those persons who are worthy of the faith and confidence of the general public are permitted to handle the affairs of others. . . . On the other side are placed the subsequent conduct and reformation of such individual, his present character, his present qualifications and competence to practice law, and the fact that the very nature of law practice places an attorney in a position where an unprincipled individual may do

tremendous harm to his client."

[12] See In re Brown, 166 W Va 226, 235; 273 SE2d 567 (1980), stating: "Most courts hold that the mere passage of time alone is insufficient to warrant reinstatement."

[13] August was convicted under 18 USC 371 of conspiring to defraud the United States of the due administration of justice and under 18 USC 1503 of impeding the due administration of justice and attempting to influence a court clerk in the discharge of her official duties. Id. at 299.

[14] This Court held: Finally, we do not agree with the board's assessment that the reinstatement criteria allow only two possibilities: that petitioner be now readmitted or forever barred from the practice of law in this state. A third alternative is illustrated
in this case, where the hearing panel determined that petitioner "could not now be safely recommended as a person of trust." [Id. at 312-313.]

[15] The Attorney Discipline Board stated: [T]he testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo.

[16] We note that even though a period of time has now elapsed since petitioner was under the supervision of parole authorities, he has been involved in his petition for reinstatement since his release from parole. Therefore, we are equally unable to safely judge whether petitioner has now been rehabilitated-even though some time has elapsed outside the supervision of parole authorities-because his actions have been under similar, if not heightened, scrutiny by the Attorney Grievance Commission, the hearing panel, and the Attorney Discipline Board.

Opinion Footnotes- 14/March, 1995: Weaver, J. (Concurring in the result only).

[1] MCR 9.105 and MCR 9.123(B)(7)
[2] MCR 9.123 (B)(6)
[3] MCR 9.122 (E)

Opinion Footnotes - 14/March, 1995: Levin, J. (dissenting)

[1] McWhorter appealed the conditions of reinstatement. They were eliminated by the board without contest by the Grievance Administrator.

[2] See People v Buckey/McWhorter, 424 Mich 1; 378 NW2d 432 (1985), and People v McWhorter (On Remand), 150 Mich App 826; 389 NW2d 499 (1986).

[3] McWhorter presented testimony from numerous witnesses, including his pastor, family members, and other local attorneys who testified to the changes in his personality and his current moral fitness and character. His pastor discussed McWhorter's extensive and sincere (in the pastor's opinion) involvement in church activities. McWhorter's wife and children related the changes in McWhorter's personality and the improvement in their relationships with him. Local attorneys who knew McWhorter or used his legal research services testified to his competence and skill. His therapist testified regarding the progress he had made in therapy since he started while on parole in 1986. McWhorter testified, and acknowledged that numerous personal problems affected his judgment at the time the crimes were committed, including alcoholism and emotional difficulties.

[4] The dissenting member of the panel said that "McWhorter has made significant strides in becoming a contributing member of our society, but I do not believe he has yet

established that he should be reinstated to the honorable practice of law at this time."

[5] Under MCR 9.123(B)(6), a petitioner must establish by clear and convincing evidence that "he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards."

[6] MCR 9.123(B)(7) provides that the board must conclude by clear and convincing evidence that the petitioner "can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court..."

[7] Id. at 313-314

[8] Id. at 314. The majority acknowledged that the seriousness of the underlying criminal conduct should be considered in deciding whether a disbarred lawyer should be reinstated, distinguishing between conduct unrelated to the practice of law and conduct involving the corruption of the administration of justice. Id. at 310. The majority also noted that some jurisdictions hold that certain conduct may be so egregious that reinstatement should be precluded; however, the Court declined to so rule on the facts presented. Id. at 313.

The Court remanded for a determination whether sufficient time had elapsed to assess August's fitness and a majority of the board panel subsequently ordered reinstatement. however, the Court issued a peremptory reversal of the order and denied the petition for reinstatement on the basis of reasoning of the dissenting opinion.

In re Reinstatement of August, 441 Mich 1207 (1993).

[9] Id. at 1207. Both the hearing panel and the ADB ordered reinstatement. Callanan had been released from confinement in November, 1988, almost four years before the Court's October 30, 1992, order.

[10] Although this Court in August, supra at 313, n 11, noted that certain states have permanently precluded reinstatement under some circumstances, some of these ruler have changed since August was decided. The United States Court of Appeals for the District of Columbia overruled In re Kerr, 424 A2d 94 (DC App, 1980), in In re McBride, 602 A2d 626 (DC App, 1992), in which the court revisited the District of Columbia Code provision related to disbarment for acts of moral turpitude and concluded that it should not be interpreted to require permanent disbarment. 602 A2d 640-641.

[11] In re Rosellini, 108 Wash 2d 350, 364; 739 P2d 658 (1987). See also In re Robbins, 172 Ariz 255, 256; 836 P2d 965 (1992); Florida Bar re Hipsh, 586 So 2d 311, 314 (Fla, 1991) (distinguishing between disbarred and permanently disbarred, but still permitting application for reinstatement by leave of court).

> The West Virginia Supreme Court observed:
> The concept of rehabilitation cannot be framed around a set of specific principles but will vary depending on the particular facts of a given case. Rehabilitation, ultimately, is demonstrated by a course of conduct that enables the Court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in

unprofessional conduct. [In re Brown, 166 W Va 226, 234; 273 SE2d 567 (1980).]

[12] N 3 supra.

[13] See also In re Trygstad, 472 NW2d 137 (Minn, 1991) (reinstating an attorney who had been disbarred for 7-1/2 years on the basis of his conviction for the sale of cocaine to an undercover officer).

[14] Wegner presented evidence that alcohol had been a serious problem in his life at the time of his misconduct, that he had undergone a marked change in his personality since disbarment, that he had been a conscientious and diligent worker in his employment after release from prison, that he participated in Alcoholics Anonymous and had abstained from alcohol since 1982, and that a psychiatrist had determined that he had made a complete psychological rehabilitation since 1978 with no chance that he would repeat his illegal behavior. Id. at 99.

Other courts have concluded that petitioners who had offered substantial evidence of their good conduct and treatment since disbarment should be reinstated. In Rosellini, n 11 supra, the Washington Supreme Court noted that the petitioner had sought professional counseling, worked in increasingly responsible positions, received letters praising his integrity and honesty from employers, and participated in a wide variety of community activities, including his church and his children's schools. Id. at 359. See also In re Moynihan, 113 Wash 2d 219; 778 P2d 521 (1989) (reinstatement was ordered for a lawyer who had been disbarred for misuse of client funds on the basis of evidence that he participated in alcohol treatment and community activities, as well as letters from members of the community testifying regarding his character and professional

reputation); Robbins, n 11 supra, (reinstatement was ordered for a lawyer disbarred for misuse of client funds on the basis of evidence that he had worked diligently to reform himself and had been a good citizen for more than a decade).

[15] Id. at 100. The court imposed several conditions on reinstatement, including continued sobriety.

[16] In Callanan, it was unclear how much time had passed since Callanan had been released from parole, although it appears to have been for far less time than in the instant case. In August, the petitioner waited three years after release from prison to request reinstatement, as distinguished from seven in the instant case.

[17] Slip op, p 12.

[18] See Wegner, 417 NW2d 99-100; Rosellini, n 11 supra at 360; cf. In re Avcollie, 43 Conn Supp 13, 22; 637 A2d 409 (1993) ("A redemptive and rehabilitative life requires the passage of time for documentation").

Michigan Supreme Court
Lansing, Michigan

Order
Entered: February 28, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re Petition for Reinstatement
of ROBERT A. McWHORTER

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ROBERT A. McWHORTER,
Petitioner-Appellee,
and
GRIEVANCE ADMINISTRATOR, SC 99848
Appellant. ADB 92-83-RP

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On order of the Court, the motion to strike is considered, and it is DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
February 28, 1995

Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: October 19, 1994

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re Petition for Reinstatement
of ROBERT A. McWHORTER

---

ROBERT A. McWHORTER,
Petitioner-Appellee,
and
GRIEVANCE ADMINISTRATOR,
Appellant.

SC 99848
ADB 92-83-RP

---

Leave to appeal GRANTED.
Reconsideration DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
October 19, 1994

Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: August 24, 1994

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re Petition for Reinstatement
of ROBERT A. McWHORTER

---

ROBERT A. McWHORTER,
Petitioner-Appellee,
and
GRIEVANCE ADMINISTRATOR, SC 99848
Appellant. ADB 92-83-RP

---

Motion for immediate consideration is considered, and it is GRANTED. Motion for a stay also is considered, and it is GRANTED. The reinstatement order entered by the Attorney Discipline Board on May 20, 1994, and the earlier reinstatement order entered by the Hearing panel are STAYED until the further order of this Court.

Motion to strike also is considered, and it is *DENIED*. The application for leave to appeal remains under consideration.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 24, 1994

_____

Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: September 19, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

Rehearing No. 339
In re Petition for Reinstatement
of ROBERT A. McWHORTER

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ROBERT A. McWHORTER,
Petitioner-Appellee,
v
GRIEVANCE ADMINISTRATOR, SC 99848
Appellant. ADB 92-83-RP

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In this cause, a Motion for rehearing is considered, and is hereby DENIED.

Levin, Cavanagh, and Mallett, Jr., JJ., would grant rehearing.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 1995

Clerk

STATE OF MICHIGAN
*ATTORNEY DISCIPLINE BOARD*

In the Matter of the Reinstatement
Petition of Robert A. McWhorter, P 17563,

Petitioner. Case No. 92-38-RP

_____/

ORDER OF REMAND

Considered by the Attorney Discipline Board
719 Griswold Street, Suite 1910, Detroit, MI

A Conditional Order of Reinstatement was issued by Tri-County Hearing Panel #15 in this matter of April 7, 1993. A Petition for Review has been filed by the Grievance Administrator seeking reversal of the hearing panel's order. Pursuant to MCR 9.118(B), the Attorney Discipline Board issued an Order to Show Cause on May 6, 1993 directing the parties to appear before the Board on July 8, 1993 to show cause why the hearing panel's order should not be affirmed. The motion of petitioner Robert A. McWhorter to adjourn that hearing was granted by the Board and this matter was rescheduled for review hearing on September 9, 1993.

The Board has conducted a preliminary review of the pleadings filed by the parties and the issues to be considered. Specifically, the Board has considered the evidence in the record below concerning the petitioner's parole from 1985 to June 28, 1992. The Board has further considered an order denying reinstatement issued by the Michigan Supreme Court in the Matter of the reinstatement of Evan H. Callanan, Jr., 440 Mich 1207; 487 NW2d 750 (1992). In that order, the Court ruled that:

"The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission".

Based upon this review, the Board has concluded that there is not sufficient evidence in the record upon which to evaluate the nature and scope of the "supervision of federal authorities" in this case as that term appears in Matter of the Reinstatement of Evan H. Callanan, Jr., supra.

The Board has further concluded that development of a complete record on this issue will best serve the interests of the public, the courts, the legal profession and the petitioner.

NOW THEREFORE,

IT IS ORDERED that this matter is REMANDED to Tri-County Hearing Panel #15 for an evidentiary hearing confined to the precise nature and scope of the petitioner's supervision by federal authorities during the period of his parole, including but not limited to the general procedures or guidelines, if any, employed by the probation office of the United States District Court for the Western District of Michigan and the frequency and extent of the petitioner's contact with the probation office or other federal authorities during the period of his parole.

Following such a hearing, the panel is directed to file a supplemental report with the Board summarizing its findings and conclusions with regard to the nature and extent

of the petitioner's supervision by federal authorities while on parole.

IT IS FURTHER ORDERED that the hearing shall be scheduled by the assignment clerk of the Attorney Discipline Board as soon as may be practical.

ATTORNEY DISCIPLINE BOARD

BY:_____
John F. Burns, Chairman

STATE OF MICHIGAN

Attorney Discipline Board

In the Matter of the Reinstatement Petition of Robert A McWhorter, P 17563, Petitioner.

_____/ Case No. 92-83-RP

ORDER DENYING MOTION TO ENLARGE SCOPE OF REMAND HEARING

Considered by the Attorney Discipline Board
719 Griswold Street, Ste 1910, Detroit, MI

This reinstatement matter was remanded to a hearing panel for a supplemental report in accordance with an Order of Remand issued by the Board on August 2, 1993.

The hearing was scheduled and conducted on September 28, 1993. The Board has considered the motion filed on behalf of the Grievance Administrator on September 29, 1993 requesting that the scope of the remand hearing be enlarged to allow the Administrator to present evidence bearing upon the petitioner's compliance with MCR 9.123(B)(3,4).

The Board has further considered the supporting affidavit filed October 1, 1993. The Board is not persuaded that the motion and supporting affidavit are sufficiently detailed as to the nature and scope of the activities in question.

NOW, THEREFORE,

IT IS ORDERED that the Grievance Administrator's Motion to Enlarge the Scope of the Remand Hearing is DENIED.

ATTORNEY DISCIPLINE BOARD

By_____
Elaine Fieldman, Chairperson

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement
Petition of Robert A McWhorter, P 17563,

Petitioner/Appellee.

Case No. 92-83-RP

BOARD OPINION

This is a reinstatement matter involving a former attorney, Robert A McWhorter, whose license was suspended for 121 days, effective October 29, 1979 and subsequently revoked effective February 24, 1981. That revocation order was the result of the respondent's conviction on May 29, 1980 of the crimes of kidnapping and conspiracy to forcibly seize and kidnap another with the intent to extort money in violation of MCLA 750.349 and MCLA 750.157(a).[1]

On April 8, 1993, the hearing panel assigned to rule upon the petitioner's fitness for reinstatement entered an order of reinstatement, with conditions. By a vote of two to one, the panel found that the petitioner had fulfilled the applicable criteria of MCR 9.123(8) and had established his eligibility for reinstatement by clear and convincing evidence.

The Grievance Administrator has petitioned for review on the grounds that the seriousness of the criminal conduct which resulted in revocation of petitioners license precludes his reinstatement. The petitioner filed a

cross-petition for review seeking the elimination of the conditions imposed by the panel.

In accordance with MCR 9.118(8), the Attorney Discipline Board issued an order to show cause on May 6, 1993 directing the parties to appear before the Board to show cause why the hearing panel's conditional order of reinstatement should not be affirmed. Prior to such hearing, the Board, on its own motion, remanded this matter to the hearing panel for an evidentiary hearing and supplemental report on the nature and scope of the petitioner's supervision by federal authorities during the period of his parole. The panel's supplemental report, filed December 13, 1993, was accompanied by exhibits and transcripts of the testimony of two federal parole officers regarding the petitioner's supervision from August 1988 through June 1992. That proceeding is included in the record considered by the Board on review.

On review, the Board must first determine whether or not the findings of the hearing panel have proper evidentiary support on the whole record. In re Freedman, 406 Mich 256; 277 NW2d 635 (1979); In re Grimes, 414 Mich 483; 326 NW2d 380 (1982); Grievance Administrator v August, 438 Mich 296 (1991).

As in August, supra, the Grievance Administrator's challenge is not to the factual findings of the hearing panel but to the panel's ultimate determination that the petitioner should now be reinstated, notwithstanding the nature of his criminal conduct in 1977 and 1978, the resulting felony convictions and the revocation of his license to practice law in 1981. While the Board reviews that judgment for adequate evidentiary support, the Board at the same time possesses a measure of discretion with regard to its ultimate decision.

In re Daggs, 411 Mich 304, 318-319; 307 NW2d 66 (1981); Grievance Administrator v August, 438 Mich 296, 304 (1991).

The Grievance Administrator does not challenge the panel's factual findings as to those eligibility requirements of MCR 9.123(B) which may be verified objectively, for example whether five years have elapsed since revocation [MCR 9.123 (B)(2)], whether or not the petitioner has practiced or attempted to practice law during the period of revocation [MCR 9.123(B)(3)l; the applicant's compliance with the order of revocation MCR 9.123(B)(4)l, and whether or not the applicant's conduct since the order of discipline has been exemplary and above reproach [MCR 9.123(B)(5)l.

Rather, the Board is asked to rule that the hearing panel erred in finding that the petitioner established the requirements of MCR 9.123(B)(5), that the petitioner has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards, and MCR 9.123(B)(7), that he can be safely be recommended to the public, the courts and the legal profession as
a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence and in general to aid in the administration of justice as a member of the bar and as an officer of the court.

As the Grievance Administrator points out, the petitioner's prior criminal misconduct stands as irrefutable evidence that in 1977 and 1978 he did not have a proper understanding of and attitude toward the standards imposed on practicing members of the bar at that time. We are not persuaded, however, by the claim on appeal that the petitioner failed to establish at reinstatement proceedings

conducted some fourteen years later that he had satisfied the criteria of MCR 9.123(B) (6,7).

In Grievance Administrator v August, supra, the Supreme Court ruled that the Board had applied an erroneous standard of review to the panel's findings under MCR 9.123(B). There the Board reversed a hearing panel decision denying reinstatement to a petitioner whose license had been revoked following a felony conviction. The conviction in that case stemmed from August's collaboration with a clerk of a United States Bankruptcy Court to manipulate the blinddraw system for assigning judges. In August, the Court distinguished sub-rule (6) which deals with the applicant's ability, willingness and commitment to conform to the standards required of members of the bar from sub-rule (7) which focuses on the public trust which the Court (and its adjudicative and prosecutorial branches) must protect. Specifically, the Court noted that sub-rule (7) involves "the discretionary question of whether the Court is willing to present that person to the public as a counselor, member of the state bar, and officer of the Court bearing the stamp of approval from this Court". August, 438 Mich 296, 311.

In its discussion of those criteria, the Court recognized "an element of subjective judgment in the application of MCR 9.123 (B)", August, supra at 311. We cannot conclude that the element of subjective judgment referred to by the Court in August is reserved for judicial review of contested reinstatement matters. Certainly, an element of subjective judgment by the Board is entirely consistent with the Courts pronouncement that the standard of review to be applied by the Board includes "a measure of discretion with regard to its ultimate decision". In re Daggs, 411 Mich 304, 318-319 (1981); Grievance Administrator v

August, supra at 304. More importantly, the element of subjective judgment in the application of MCR 9.123(B)(6,7) is applicable to the findings and conclusions of the hearing panel which is in the unique position during the reinstatement process of assessing the character and demeanor of the petitioner and, in some cases, the credibility of other witnesses who may be called to testify.

In short, the Board's review in reinstatement cases must combine and balance the standards enunciated by the Court. i.e. review of the panel's findings for proper evidentiary support, recognition of the element of subjective judgment which is applicable to MCR 9.123(B) and, finally, the measure of discretion granted to the Board with regard to its ultimate decision.

Applying that standard of review to the record in this case, we believe that the hearing panel's decision to grant reinstatement should be affirmed.

Public hearings were conducted before the panel on four separate days between August 12, 1992 and November 9, 1992. In the course of those hearings, the panel had ample opportunity to consider and evaluate the credibility and sincerity of the petitioner during his testimony and cross-examination. In addition to that testimony, the panel was in a position not shared by this Board to observe, assess and question if necessary the other witnesses who testified on the petitioner's behalf. These witnesses included:

1) The pastor of the Peoples' Church in Kalamazoo who testified that petitioner has been an active member of that church for approximately four years where he participates in a number of church activities, particularly the "extended family program;

2) Two other members of petitioner's church who testified as to petitioner's reputation for honesty and trustworthiness and his strong participation in activities of the church;

3) Three attorneys from the Kalamazoo area testified that they had hired the petitioner and his company, Research Unlimited, on more than one occasion to do legal research and write appellate briefs. Each testified that he had a high opinion of petitioner's work product, his legal capabilities, and personal qualities and each found him to be honest and trustworthy. Each of these attorneys also testified that he knew of no instance in which the petitioner had attempted to practice law during the period of revocation and that he had not held himself out as an attorney during that period;

4) Two other Kalamazoo attorneys offered testimony of their personal and/or professional relations with the petitioner during the period of revocation. One of these witnesses testified to his admiration of the petitioner's "ethical morality", the other testified to the petitioner's "keen awareness of ethical standards";

5) A former legal assistant to an attorney who appeared on petitioner's behalf testified that she considered petitioner to be a mentor during the year she had known him and that she found him to be trustworthy and honest;

6) An auto salesman who met petitioner shortly after he was released from prison and who has known him for approximated seven years testified as to petitioner's honesty and rehabilitation;

7) A legal secretary/legal assistant who has known

petitioner since 1985 testified as to the high quality of his legal research, his devotion to the law and her impressions as to his honesty and integrity;

8) Suzanne Kallan, PhD, a clinical psychologist testified that petitioner had been in treatment with her on a regular basis since 1986. She found the petitioner to be candid and forthright with her regarding his background, including his criminal convictions. She testified that the petitioner had benefited from psychotherapy and had made psychological and emotional adjustments during the past six years;

9) An attorney who has known petitioner since 1985 testified that his former law firm had hired the petitioner to do some research on complex cases and that he had an opportunity to work with petitioner on some of that research. He testified that petitioner referred to himself as a "researcher", and never as an attorney and that he believed that the petitioner was sensitive to ethical issues;

10) An attorney who has known petitioner since 1975 testified to the panel that he had
observed a change in the petitioner's attitudes and personality over the years to the point that while he and the petitioner had had conflicts and personality clashes in the past, he would be willing to associate with the petitioner professionally in the event of his reinstatement;

11) Petitioner's daughter, a licensed attorney since May 1992, testified that her father's attitude and personality had changed since his incarceration and that he now takes more interest in church and family;

12) Petitioner's son, a law school student, testified to the petitioner's devotion to the law and his resulting motivation to become an attorney;

13) The petitioner's wife testified as to the petitioners efforts to reestablish his relationship with his wife and children since his incarceration. She testified that she first noticed these changes while he was in prison, where he attended AA, taught other inmates to read and participated in a marriage encounter group. She also testified as to the petitioner's decision to go into therapy after his release from prison as well as the end or his abuse of alcohol.

Taken as a whole, the testimony presented by the petitioner and the witnesses on his behalf constitutes a body of evidence upon which the panel could find that the petitioner had satisfied the criteria of MCR 9.123(B) clearly and convincingly.

We are mindful of the witnesses called by the Grievance Administrator in opposition to the petitioner's reinstatement. The petitioner's former legal secretary from 1968 to 1977 testified that during the period of employment by petitioner, he was not timely for meetings or court appearances, was not always truthful with his clients or employees, appeared in court after lunches which included alcohol and that petitioner was getting himself involved... over his head with some of the clients, and there was too much stress for me. I wanted out". (Tr. p. 22)

The chief assistant prosecutor for Kalamazoo County testified as to the petitioner's abrasive and offensive manner toward parties and their counsel prior to his revocation. This witness also testified that he prosecuted the kidnapping case

against the petitioner. During that time, he testified, the petitioner showed no signs of remorse and never acknowledged his guilt.

Finally, the Grievance Administrator called the assistant U. S. attorney assigned to the criminal case against the petitioner in the U. S. District Court for the Western District of Michigan. The witness testified to the nature of the allegations and the proceedings against the petitioner. He also testified that the petitioner refused to acknowledge guilt during the criminal proceedings against him.

As the standard of review makes clear it is not within the Board's province to substitute its own, judgment for that of the hearing panel on issues of credibility. Therefore, it is not necessarily significant that the witnesses on the petitioner's behalf outnumbered those called by the Grievance Administrator. The Board's review for evidentiary support is not concerned with the relative weight which we would give to conflicting testimony if this matter was considered de novo. Nor is the issue before us whether or not there is evidentiary support for the position urged by the party seeking review. Rather the issue is whether or not there is proper evidentiary support for the panels findings. We conclude that there was. Furthermore, it is noteworthy that the witnesses called on the petitioner's behalf testified primarily as to the petitioner's present character and reputation based upon professional or personal relationships with the petitioner since his release from incarceration. By contrast, the witnesses who testified in opposition testified primarily to the petitioner's character and reputation as it existed prior to 1981.

The Grievance Administrator also asserts that the panel should be reversed on the grounds that "the seriousness

of petitioner's criminal conduct precludes his reinstatement". (Grievance Administrator's Supporting Brief, p.9)

Once again, we turn to the Supreme Court's 1991 opinion in Grievance Administrator v Irving August for guidance. In that opinion, the Court made it clear that while MCR 9.123(B)(2) allows a disbarred attorney to apply for reinstatement after five years, this "temporal milepost" merely fixes the minimum time after which a disbarred attorney may be declared rehabilitated. August, supra at 309. As the Court noted:

> "The determination whether the disbarred attorney may be safely recommended to the position of public trust held by members of the state bar necessarily requires consideration of the time elapsed since disbarment and since the commission of the acts resulting in disbarment. This is only consonant with the established principle that each attorney misconduct case is to be considered on its own facts. Grimes, 414 Mich 490, State Bar Grievance Administrator v DelRio, 407 Mich 336, 350; 285 NW2d 277 (1979). Obviously the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney whose disbarred resulted for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law. It is also obvious that a showing of present fitness may require a length of period of rehabilitation where an attorney has engaged

> in a repeated or calculated series of acts designed to corrupt the administration of justice than in the case of an attorney whose disbarment resulted from a single instance of similar conduct. . .August at 310.

In this case, the order revoking the respondent's license law became effective February 24, 1981. The petitioner passed the temporal milepost created by MCR 9.123(B)(2) on February 24,1986 and he was eligible to file a petition for reinstatement at that time. In fact, another six years elapses before the petitioner petitioned for reinstatement on April 6 1992. The record discloses that the criminal conduct engaged in by the petitioner occurred during the years 1977 and 1978. Under August, it is appropriate to consider the fourteen year period since the commission of the acts resulting in disbarment.

We must first confront the apparent position taken by the Grievance Administrator that there is no need to weigh the egregiousness of the petitioner's criminal conduct against the time which has elapsed because the nature and scope of petitioner's activity "precludes reinstatement".

In the opinion reversed by the supreme Court in Grievance Administrator v August, the Board stated:

> "Affirmation of the denial of reinstatement in this case demands a ruling that there are certain types of professional misconduct which are so egregious that reinstatement should never be granted. While we do not necessarily disagree with this proposition, it is our belief that the Supreme Court alone has the authority to promulgate such a rule." Matter of the Reinstatement Petition of Irving A August,

Addressing that issue in its opinion in August, the Court noted that a number of jurisdictions do hold that there is conduct so egregious that it should preclude reinstatement to the practice law. However, the Court said:

> "We need not rule on that question because we are not prepared to say that this is such a case". Grievance Administrator v August, 438 Mich 296, 313.

The felonious conduct engaged in by petitioner Irving August resulted in convictions for conspiring to defraud the United States of the due administration of justice in violation of 18 U.S.C. 371, impeding the due administration of justice in violation of 18 U.S.C. 1503, and attempting to influence a court clerk in the discharge of her official duties in violation of 18 U.S.C 1503. In August, the Court noted that:

> "Obviously, the question whether an attorney may be safely recommended to the public is a different inquiry in the case of an attorney disbarred for corrupting the administration of law than in the case of an attorney whose disbarment resulted from conduct unrelated to the practice of law". Grievance Administrator v August, 438 Mich 296, 310.

In the present case, petitioner McWhorter was disbarred following his conviction on state charges of kidnapping and conspiracy to kidnap with the intent to extort money. During the period of revocation, a federal conviction which had previously been dismissed was reinstated. Those convictions include conspiracy to import cocaine, the unlawful manufacture of controlled substances, conspiracy to distribute controlled substances, and using a commercial

facility to facilitate the manufacture of controlled substances.

In August, the Court was not prepared to say that the petitioner's conviction for corrupting the administration of justice was conduct so egregious that it should preclude reinstatement to the practice of law. Mindful of the distinction drawn by the Court in August between a disbarment for corruption of the judicial system and a disbarment for conduct unrelated to the practice of law, we are not prepared to say now that petitioner McWhorter's conviction for conduct not directly related to the practice of law or the administration of justice should bar has reinstatement forever.

After four days of hearing, the hearing panel in this case applied the element of subjective judgment approved by the Court in August and determined that when the egregiousness of the petitioner's conduct was weighed against the fourteen years which had elapsed since the misconduct and the eleven years since the effective date of the order of revocation, the scale was not tipped against reinstatement.

We have also reviewed the panel's decision in light of Matter of the Reinstatement Petition of Evan H Callanan, Jr 440 Mich 1207, 487 NW2d 750 (1992). There, the petitioner's license was revoked effected effective September 1, 1983 following his felony conviction of making false declarations before a grand jury and obstruction of justice. Callanan's petition for reinstatement was filed August 21, 1990. The record before the panel disclosed that, following his conviction, Callanan was incarcerated for a period of three years. Following his release from a half-way house in November 1988, he was on parole until April 7, 1992. The hearing panel's decision to grant reinstatement in Callanan was affirmed by the Board. In lieu of granting leave to

appeal, the Supreme Court peremptorily reversed and ordered that the petitioner not be reinstated at that time. The Court stated:

> "The misconduct that led to the revocation of the petitioner's license to practice law was substantial and, because the petitioner had spent little or no time outside the supervision of federal authorities since his license was revoked, it was not possible for the hearing panel and the Attorney Discipline Board to determine the present fitness of the applicant for readmission".[MCR 9.123(B)(6,7)]
> Callanan, supra.

Recognizing the potential applicability of the Court's order in Callanan to the present case, the Board ordered that the matter be remanded to the hearing panel for further testimony and a supplemental report focusing an the issue of the nature and scope of McWhorter's supervision by federal authorities following his incarceration.

Petitioner McWhorter was incarcerated for a period of forty months. He was on parole from his release in 1985 until June 28, 1992. We have considered the Grievance Administrator's argument that Evaluation of petitioner's conduct while under strict restraint and supervision is not an adequate basis by which to gauge his behavior and render a decision upon his fitness to be reinstated to the practice of law". (Grievance Administrator's Brief, p. 13) Based upon the supplemental testimony of two federal parole officers assigned to petitioner McWhorter, we cannot conclude that the petitioner was under strict restraint and supervision from 1985 to 1992. We find no evidentiary basis in the record for the assertion that the petitioner reported to a federal parole

officer "who monitored his daily activities". On the contrary, the testimony of the parole officers established that his reporting on a monthly basis eventually consisted of little more than perfunctory meetings during which the petitioner confirmed his continued residence and employment in Kalamazoo. This petitioner lived, worked and engaged in sufficient contacts with his community as a whole during the seven years following his incarceration to sharply differentiate this case from the situation presented in Callanan.

Finally, we have considered the petitioner's cross-petition for review which seeks the elimination of the following conditions imposed by the hearing panel: 1) that the petitioner continue his weekly therapy sessions; 2) that petitioner maintain activity with his church and that his minister submit two reports as to petitioner's progress and attitudinal changes at intervals of six months and five months; 3) that petitioner submit bi-monthly reports to the panel from his therapist or a qualified psychologist; and 4) that petitioner attend bi-monthly meetings with an attorney appointed by the Board and that the monitoring attorney submit a report as to petitioner's activities every two months. The panel's conditional order of reinstatement issued April 7, 1993 directed that if the petitioner fully complied with those conditions, a final order of unconditional reinstatement would be entered March 31, 1994.

The Grievance Administrator's argument that the publication of a conditional order of reinstatement will erode public confidence in the legal system by giving the impression that attorneys will be admitted to practice even though full rehabilitation has not been established has been largely vitiated by the Supreme Court's amendment to MCR

9.124(D), effective March 1, 1994 which allows entry of a reinstatement order subject to conditions. Under this rule, such conditions must be "relevant to the established misconduct or otherwise necessary to insure the integrity of the profession, to protect the public, and to serve the interests of justice".

The petitioner has raised legitimate questions regarding the appropriateness of a discipline order requiring attendance at a particular church and he has alluded to potential problems of client confidentiality which may be presented by the monitoring or his practice by another attorney. We need not address these concerns individually. We are persuaded that the record as a whole establishes an adequate basis upon which to evaluate the petitioner's work history, involvement in church activities, voluntary continuation of therapy on a regular basis, family relationships and personal development during the last seven years in his community. We do not find that the interim conditions ordered by the panel in March 1993 are necessary to achieve the protection of the public which is the overriding goal of these proceedings.

For all of the above stated reasons, we conclude that the hearing panel decision to grant reinstatement was based upon ample evidentiary support and was an appropriate application of the subjective judgment which is inherent to a determination of eligibility for reinstatement under MCR 9.123(B). Appropriate grounds for reversal the panel's decision have not been established.

Concurring: John F Burns, George E Bushnell, Jr., Elaine Fieldman, Barbara B Gattorn, Albert L Holtz, Linda S Hotchkiss, M.D. and Miles A Hurwitz.

Not Participating: Marie Farrell-Donaldson and C Beth DunCombe

Attorney Discipline Board
Board Opinion Footnotes

[1] An earlier order of revocation had been entered against the petitioner in Matter of Robert A McWhorter, ADB Case No. 35951-A as the result of his conviction in the United States District Court for the Western District of Michigan of the crimes of aiding and abetting in the manufacture of methamphetamine in violation of Sec. 841(a)(l), (b)(l), (B) Title 21 U.S.C) and Sec 2(a), Title 18 U.S.C. That order of revocation was vacated by the Attorney Discipline Board on September 9, 1980 upon the entry of an order by the U.S. Sixth Circuit Court of Appeals reversing the conviction and remanding the matter for trial. The petitioner was ultimately convicted of conspiracy to import cocaine, unlawful manufacture of methamphetamine and conspiracy to distribute methamphetamine. The petitioner's second appeal to the Sixth Circuit Court of Appeals was denied and those convictions were upheld on October 29, 1982. Disciplinary proceedings based upon the federal convictions were not reinstated. However, the circumstances of the petitioner's federal conviction and his resulting incarceration and parole were included in the investigative report filed with the hearing panel and they were argued and considered by the reinstatement hearing panel.

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement Petition
of Robert A McWhorter, P 17563,
Petitioner/Appellee. Case No. 92-83-RP

/

ORDER MODIFYING HEARING PANEL ORDER OF REINSTATEMENT

Considered by the Attorney Discipline Board
719 Griswold Street, Suite 1910, Detroit, MI

The Grievance Administrator has filed a petition for review asking that hearing panel's Conditional Order Granting Reinstatement be reversed, and the petitioner has filed a cross petition for review asking that the Conditional Order of Granting Reinstatement be modified. The Board has conducted a review hearing in accordance with MCR 9.118, reviewed the pleadings and arguments of the parties and is otherwise fully advised;

NOW, THEREFORE,

IT IS ORDERED that the hearing panel Conditional Order of Reinstatement is MODIFIED by VACATING the following conditions:

1) that the petitioner continue his weekly therapy sessions;

2) that petitioner maintain activity with his church and that his minister submit two reports as to petitioners progress and attitudinal changes at intervals of six months and five months;

3) that petitioner submit bi-monthly reports to the panel from his therapist or a qualified psychologist; and,

4) that petitioner attend bi-monthly meetings with an attorney appointed by the Board and that the monitoring attorney submit a report as to petitioner's activities every two months.

IT IS FURTHER ORDERED that the hearing panel's decision to grant the reinstatement petition of petitioner, Robert A McWhorter is otherwise AFFIRMED.

IT IS FURTHER ORDERED that, as a condition of reinstatement, petitioner shall reimburse the State Bar of Michigan for the costs incurred in this reinstatement matter. Cost are assessed in the total amount of $3721.10. This amount includes the costs assessed by the panel in the sum of $2834 .90 and the additional costs incurred by the panel, Attorney Grievance Commission and the Attorney Discipline Board in the sum of $886.20. Cost payment shall be made payable to the State Bar of Michigan but submitted to the Attorney Discipline Board, 719 Griswold, Ste 1910, Detroit, MI 48226.

ATTORNEY DISCIPLINE BOARD

By_____

Elaine Fieldman, Chairperson

In the Matter of the Reinstatement
Application of Robert A. McWhorter, ABD Case 9-83RP
Petitioner,

REPORT OF TRI-COUNTY HEARING PANEL #15

At a session of Wayne County Hearing Panel #15 of the Attorney Discipline Board, held at One Kennedy Square, Ste. 1910, Detroit Michigan on August 12, 1992.

Present: Robert E. Eggenberger, Chairperson
Philip D. Dexter, Panel Member
Roberta M. Hamm, Panel Member

Appearances: Susan Gilloly, ESQ.
Counsel for Grievance Administrator

John F. X. Dwaighy, ESQ.
Counsel for Petitioner

Also Present: Robert A. McWhorter, Petitioner

RECORD

Public hearings were conducted on the petition for reinstatement of Robert A. McWhorter at the offices of the Attorney Discipline Board on August 12, 1992, August 26, 1992, September 4,1992, and November 9, 1992.

Robert E. Eggenberger, Chairperson, Philip D. Dexter, Panel Member and Roberta M. Hams, Panel Member, were present throughout the hearing sessions.

## EXHIBITS

1. Investigative Report of the Grievance Administrator pursuant to MCR 9.124 (B)
2. Petitioner's Exhibit 1 - Letter dated August 7, 1992
3. Petitioner's Exhibit 2 - Letter dated August 6, 1992
4. Petitioner's Exhibit 3 - Letter dated August 6, 1992
5. Petitioner's Exhibit 4 - U. S. Government Memo dated February 23, 1984
6. Petitioner's Exhibit 1 - Letter dated February 1, 1990 from the Kalamazoo Civic Players
7. Petitioner's Exhibit 2 - Business card
8. Petitioner's Exhibit 6 - Settlement Agreement
9. Respondent's Exhibit A - Letter dated July 31, 1992
10. Respondent's Exhibit B - Letter dated August 7, 1992
11. Respondent's Exhibit C - Appendix
12. Respondent's Exhibit C - Yellow Pages advertisement
13. Respondent's Exhibit D - Letter from Probation Officer Scrutchions dated August 19, 1992
14. Respondent's Exhibit E - Deposition synopsis of Darcy C. Gray
15. Respondent's Exhibit F - Application for relief from State Bar Client Security Fund

## FINDINGS OF FACT

Petitioner, Robert A. McWhorter is 53 years of age and was licensed to practice law in the State of Michigan in 1966. The primary area of petitioner's practice of law was criminal defense.

Petitioner Robert A. McWhorter's license to practice was under consideration for revocation pursuant to two separate felony charges and two separate complaints.

In a Formal Complaint filed on or about January 31,

1979, File Na. 35953-A, petitioner was charged with violation GCR 953 (1-5), 969 an Canon 1 of the Code of Professional Responsibility, DR 1-102 (A) (l), (3-6) pursuant to his conviction of a ten count indictment in the United States District Court, Western District of Michigan for the felony of knowingly, intentionally and unlawfully aiding and abetting in the manufacture of methamphetamine, a schedule III controlled substance.

On October 3, 1980, Mr. McWhorter was found guilty in United States District Court, Western District of Michigan, of aiding and abetting in the manufacture of methamphetamine, in violation of 21 USC 841 (a) (1); 18 USC 2(a) and 21 USC 841 (b)(l)(B).

By notice dated September 15, 1980, the order of disbarment was vacated due to the 6th Circuit remand of Mr. Mcwhorter's criminal case to the Michigan court for trial. The petitioner was subsequently found guilty.

A second Formal Complaint was filed on or about June 20, 1980, File No. DP 120/ 80, petitioner being charged with violation of Canon 1 of the Code of Professional Responsibility DR1-102 (A)(3)-(4) and GCR 953 (2)-(5), pursuant to his conviction in Kalamazoo County Circuit Court of kidnapping in violation of MCLA 750.349, and of conspiracy to forcibly seize and kidnap another with intent to extort money in violation of MCLA 750.157 (a).

On May 29, 1980, Mr. McWhorter was found guilty of these charges.

Petitioner's License to practice law was revoked effective February 24, 1981 as a finding of DP 120/80.

Petitioner was previously suspended for misconduct in handling the funds of a client, File No. 33925. The suspension of 121 days effective November 21, 1979 was

affirmed as on appeal, Docket No. 60689.

A Notice of Automatic Suspension pursuant to MCR 9.128 for Mr. McWhorter's failure to reimburse the State Bar of Michigan for costs associated with File No. DP 120/80 was filed September 9, 1980. A Supplemental Order to Pay Cost, was filed July 16, 1992 wherein, Mr. McWhorter entered into a payment agreement to reimburse the State Bar of Michigan $100.00 per month commencing August 1, 1992 until the total amount of $1993.99 is repaid.

Mr. McWhorter's appeals of his convictions were unsuccessful and he served a prison terms for both the federal and state convictions. Additionally, Mr. McWhorter served a two year parole for his drug offense. The parole was completed on June 28, 1992.

During the trial, Petitioner presented numerous witnesses who testified as to his character.

The pastor of the church that Petitioner joined several years ago testified on petitioner's behalf. Several church members also provided testimony in support of Mr. McWhorter. Most of these individuals were aware that petitioner had spent time in prison. However they were not aware of the nature of the crimes he had committed. Most of the witnesses were informed of Mr. McWhorter's background in anticipation of petitioner's request for their testimony at this hearing.

Several members from the State Bar of Michigan also testified on Petitioner's behalf. They all generally acknowledged Petitioner's technical skills but going beyond their professional involvement with Mr. McWhorter, their personal interaction with him appeared to be limited and most of the witnesses knew the petitioner on the average of only two years.

One witness, a practicing attorney in the Kalamazoo area, has known the petitioner since 1975. He described the petitioner as arrogant and abrasive with police and other attorneys in the past but that he is now a different person.

Mrs. McWhorter testified on her husband's behalf. She acknowledged that the stresses of his law practice had contributed in part to his abuse of alcohol and his other problems. She further testified that her husband has changed.

Mr. McWhorter was under treatment with a therapist for 6 years. The therapist testified that Petitioner became involved in criminal activities because of his strong desire to be liked. She further testified that the support systems he has in place now would prevent him from succumbing to the pressures and stresses that led to his involvement in criminal activities in the past.

Mr. McWhorter has had a drinking problem in the past. Testimony by witnesses indicated that this may have impaired his ability to properly handle legal matters on occasions. Mr. McWhorter denies being an alcoholic but acknowledges that he had a drinking problem. He feels that because he could control the number of drinks he took he was not an alcoholic. He abused alcohol because of emotional pain. His therapist did not treat him for alcohol abuse. He did however participate in a group therapy program in prison (not AA). Petitioner testified that this problem cannot happen again because his priorities have changed and he now only takes an occasional social drink. There was no testimony presented to the contrary regarding petitioner's present drinking habits.

After release from prison, Mr. McWhorter worked for a short period of time as an automobile salesperson. Subsequent to that, he has been self-employed operating a

legal research company in Kalamazoo, Michigan, Research Unlimited, Inc.

The Grievance Board presented three witnesses who testified against the fitness of Mr. McWhorter to resume the practice of law. These individuals were familiar with Petitioner's conduct prior to his prison term. Two of these individuals were members of the Michigan State Bar. The third witness, worked as Mr. McWhorter's legal secretary for approximately nine years. The testimony of these three persons described Mr. McWhorter as unreliable, not truthful and not always thorough in handling legal matters.

The record also contains letters from other individuals who support Mr. McWhorter's reinstatement.

DISCUSSION AND CONCLUSIONS OF LAW

Under MCR 9.123 an attorney whose license to practice law has been revoked is not eligible for reinstatement until he has petitioned for reinstatement, and has established by clear and convincing evidence that (1) he desires in good faith to be restored to the privilege of practicing law in Michigan; (2) 5 years have elapsed since the revocation of his license; (3} he has not practiced or attempted to practice law contrary to the requirement of his revocation; (4) he has fully complied with the order of discipline; (5) his conduct since the order of discipline has been exemplary and above reproach; (6) he has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards; (7) he can be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and represent them and otherwise act in matters of trust and confidence, and in general to aid in matters of trust and

confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the Court; (8) he must be recertified by the Board of Law Examiners; and (9) he has reimbursed the client security fund of the State Bar of Michigan.

This panel concludes that Mr. McWhorter, having filed a petition for reinstatement, has established by clear and convincing evidence the he desires in good faith to be restored to the privilege of practicing law in this state. His petition so states, and as did many of the witnesses who testified on his behalf.

The record discloses that more than five years have elapsed since the revocation of Mr. McWhorter's license.

Further, Mr. McWhorter has entered into an agreement to reimburse the client security fund.

Based on the record this panel concludes that petitioner's conduct since the revocation of his license has been exemplary and above reproach.

The majority of this panel concludes that Mr. McWhorter has a proper understanding of and attitude imposed of members of the bar.

This panel further concludes that Mr. McWhorter has not practiced or attempted to practice law since his license was revoked.

With respect to requirement (7) above, as to whether petitioner can be safely recommended to the public, the courts and the legal profession, this panel is well aware of the seriousness of the acts which led to the petitioner's conviction and revocation of his license to practice law and the majority concludes that he has sufficiently satisfied this requirement as stated in our Conclusion.

The petitioner maintains his innocence in the face of

his convictions of very serious climes. The requirement to show remorse no longer exists under the Supreme Court rules. Mr. McWhorter has sought to rehabilitate himself with his family, and his community. As serious as his climes were, the Court rules, have at all times since his disbarment, led the petitioner to believe that he could file a petition for reinstatement after five years and it has been longer than that in petitioner's case. Nowhere is it stated in the rules that a person convicted of kidnapping or conspiracy to kidnap or aiding or abetting in the use of controlled substances shall be permanently disbarred. Had the Supreme Court wished to preclude certain offenders from ever applying for reinstatement, it would have done so pursuant to its rule making powers. It is not the function this panel to make a determination as to what is, or what is not, the basis for permanent revocation.

The Grievance Administrator argues that Mr. McWhorter continued denial of committing the crimes; his lack of remorse; his recent release from parole; and the seriousness of his crimes should at the very least postpone his readmission and at the very most serve to permanently restrict him from becoming a practicing attorney.

However, we are persuaded on the whole record, that Mr. McWhorter has established by clear and convincing evidence that he should be reinstated to the practice of law. Mr. McWhorter has become an active member of his church. He has been able to rebuild his relationship with his wife, daughter and son. He has established a productive business and appears to be handling the pressures associated with it. He has resumed a life in the community in spite of the opposition he has faced.

## CONCLUSION

We would reinstate the license of Robert McWhorter upon compliance with the recertification requirement by the Board of Law Examiners pursuant to MCR 9.123(C), the payment by petitioner of the expenses of these proceedings and full satisfaction of the aforestated payment agreement. Petitioners recent release from parole and the seriousness of his crimes warrant that before his license is unconditionally reinstated, that he be monitored for a period of no less than one year. Upon satisfaction of the aforestated and following conditions:

1. The petitioner continue his weekly therapy sessions;
2. The petitioner maintain activity with his church and that the minister of the church shall submit a report and opinion as to petitioners progress and attitudinal changes six months from the effective date of this opinion and a second report five months thereafter. Said reports shall be submitted to this panel;
3. The petitioner shall have his therapist or another otherwise competent or qualified psychologist to submit a report every two months. Said reports shall be submitted to this panel; and
4. Petitioner shall be required to meet with an attorney designated by local Attorney Grievance Board no less than every two months who shall interview and submit a report as to the activities of the petitioner every two months. Said reports shall be submitted to this panel.

Failure of petitioner to comply with said conditions and requirements hereof shall require a reconvening of this panel to consider further action.

If petitioner fully complies with the order hereinbefore set
forth, then effective March 31, 1994, a final order of unconditional reinstatement shall be entered.

ROBERT E. EGGENBERGER, CHAIRPERSON

PHILLIP D. DEXTER, MEMBER

ROBERTA M. HAMM, MEMBER (DISSENTING)

I adopt in full, Chairperson Eggenberger's Findings of Fact. I also concur with him, in regard to his discussion of what the petitioner has established, with two very significant exceptions. I do not feel that the petitioner has established, by clear and convincing evidence, that he can be safely recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and other wise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court, as required by subsection (7) of MCR 9.123. Nor do I believe that petitioner has a proper understanding of and attitude imposed of members of the bar as required by section (6) of MCR 9.123.

Petitioner has testified that he was not guilty of wrongdoing and he refuses to be remorseful for something he did not do. Petitioner is correct in arguing that remorse for wrongful acts, is not a prerequisite for eligibility for reinstatement. However, the petitioner was convicted by a

jury of his peers. His appeals were denied. Not only must the nature and seriousness of his acts be considered in any recommendation of the petitioner to the public, the courts and the legal profession but also whether petitioner possesses the requisite understanding for the high standard with which any member of our Bar is expected to hold the law.

The petitioner has exhibited a serious disregard for the sanctity of the law. He refuses to acknowledge his wrongdoing and while not related to the reason for his disbarment the record shows that he has been the subject of other disciplinary action.

The testimony of the three witnesses presented by the Grievance Board clearly put into question Mr. McWhorter's truthfulness, ethical considerations professional demeanor and his capability to properly handle legal matters.

In addition, although the requisite five years for application of reinstatement have passed, petitioner was only released from parole on June 28, 1992. One must question whether petitioner's exemplary behavior has been due to his supervised living under parole or has he really been rehabilitated to the high level with which attorneys are held.

This question is obviously one raised in the minds of my fellow panel members or they would not have imposed the additional conditions before final reinstatement. Yet can one rest secure in any monitoring system. Most certainly there will be clients and matters that will be started and completed before the bi-monthly interviews or even the therapy sessions.

Petitioner's own therapist testified that, petitioner has a need to be liked yet it was this need that caused the events that placed him in prison. Should not an attorney who has practiced in the area of criminal law for over ten years be

astute enough to recognize criminal activity and refrain from participating in such wrongdoing.

There were many individuals who testified in petitioner's behalf. But most of these individuals have known Mr. McWhorter for only a few years and in the limited setting of a church. A setting, the very nature of which demands proper behavior.

The petitioner very honestly indicated that he may at some future date practice criminal law again. I applaud him for his honesty. But it appears that it was the pressures of such a practice, excessive drinking and an attitude of arrogance that eventually led to Mr. McWhorter criminal activity and the loss of his license. In spite of assurances by his therapist, who it appears gave no consideration to his drinking problem in treating Mr. McWhorter, I cannot safely say, Mr. McWhorter would not once again fall into such behavior.

Mr. McWhorter has made significant strides in becoming a contributing member of our society, but I do not believe he has yet established that he should be reinstated to the honorable practice of law at this time. Grievance Administrator v August, 438 Mich 296, 475 NW 2d 256, 262 (1991).

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

In the Matter of the Reinstatement
Petition of Robert A. McWhorter, P17563,

Petitioner. _____/ Case No.92-83-RP

CONDITIONAL ORDER OF REINSTATEMENT

Considered by Attorney Discipline Board
Tri-County Hearing Panel #15

This matter is before the panel upon the filing of a Petition for Reinstatement by petitioner, Robert A. McWhorter, pursuant to MCR 9.124(A), and the Grievance Administrator having submitted a report summarizing all available evidence bearing upon petitioner's eligibility for reinstatement, and the petitioner having established by clear and convincing evidence the criteria for reinstatement set forth in MCR 9.123(B), and the panel having filed its report containing its findings and conclusions, by majority, that reinstatement should be granted, and being otherwise advised;

NOW, THEREFORE

IT IS ORDERED that the Petition for Reinstatement filed in this matter by Robert A. McWhorter Is GRANTED, subject to the following conditions:

1) IT IS FURTHER ORDERED that reinstatement is conditioned upon payment by

petitioner of costs in the amount of $2834.90. Cost payment shall be made payable to the State Bar of Michigan, but submitted to the Attorney Discipline Board [719 Griswold Street, Suite 1910, Detroit, MI 48226] for proper crediting.

2) IT IS FURTHER ORDERED that petitioner's right to engage in the active practice of law in the State of Michigan shall, in accordance with Rules 2 and 3 of the Supreme Court Rules Concerning the State Bar of Michigan, be conditioned upon petitioner's active membership in the State Bar of Michigan. It shall be petitioner's responsibility to notify the Attorney Discipline Board and the Grievance Administrator, in writing, that his annual dues to the State Bar of Michigan have been paid.

3) IT IS FURTHER ORDERED that reinstatement is conditioned upon petitioner's recertification by the Board of Law Examiners of Michigan as required by MCR 9.123(C). It shall be the responsibility of the petitioner to file proof of his recertification by the Board of Law Examiners with the Attorney Discipline Board together with proof of service showing service upon the Grievance Administrator, the State Bar of Michigan [306 Townsend Street, Lansing, MI 489331, and the hearing panel.

IT IS FURTHER ORDERED that reinstatement of petitioner's license to practice law in Michigan shall be deemed effective upon the submission of satisfactory proof

to the Attorney Discipline Board that petitioner has fulfilled each of the conditions described above.

IT IS FURTHER ORDERED that upon fulfillment of the above conditions, the petitioner shall be monitored for a period of no less than one year, subject to the following conditions:

1) The petitioner continue his weekly therapy sessions;

2) The petitioner maintain activity with his church and that the minister of the church shall submit a resort and opinion as the petitioner's progress and attitudinal changes six months from the effective date of this opinion and a second report five months thereafter. Said reports shall be submitted to this panel;

3) The petitioner shall have his therapist or another otherwise competent or qualified psychologist to submit a report every two months. Said reports shall be submitted to this panel; and

4) Petitioner shall be required to meet with an attorney designated by the Attorney Grievance Commission no less than every two months who shall interview and submit a resort as to the activities of the petitioner every two months. Said report shall be submitted to this panel.

IT IS FURTHER ORDERED that failure of petitioner to comply with said conditions and requirement hereof shall require a reconvening of this panel to consider further action.

IT IS FURTHER ORDERED that if petitioner complies with the Order hereinbefore set forth, then effective March 31, 1994, a final order of unconditional reinstatement shall be entered.

ATTORNEY DISCIPLINE BOARD
Tri-County Hearing Panel #15

BY:_____
Robert E. Eggenberger, Chairman

In the matter of the Reinstatement
Application of Robert A. McWhorter, ADB 92-83-RP
Petitioner

SUPPLEMENTAL REPORT OF THE TRI COUNTY HEARING PANEL # 15

Pursuant to the Order Of Remand, at a session of Wayne County Hearing Panel #15 of the Attorney Discipline Board, held at One Kennedy Square, Ste. 1910, Detroit Michigan on September 28, 1993;

Present: Robert E. Eggenberger, Chairperson
Roberta M. Hamm. Panel Member
Appearances: Susan Gilloly, ESQ .
Counsel for Grievance Administrator
Also present: Robert A. McWhorter, Petitioner

RECORD

Pursuant to the Order of Remand by the Attorney Discipline Boards this Panel was ordered to conduct an evidentiary hearing confined to the nature and scope of the petitioner's supervision by federal authorities during the period of his parole, including but not limited to the general procedures or guidelines employed by the probation office and the frequency and extent of the petitioners contact with the probation office.

The evidentiary hearing was held on September 28, 1993 and continued to October 1, 1993 due to a witnesses unavailability.

Exhibits

1. Petitioner's Exhibit 1 - Affidavit Of Robert McWhorter (on page 20, year is 1988 not 1987)

2. Respondent's Exhibit C - Letter dated September 27, 1992

3. Respondent's Exhibit D - Parole Form 1-33 March 1988)

4. Respondent's Exhibit E - Parole Form F-3 (Feb 82)

5. Respondent's Exhibit F - Probation Form 8 (Rev. 6 /91)

6. Respondent's Exhibit G - probation Form 37 (Rev. 11/91)

Petitioner's parole period was June 26, 1985 through June 28, 1992. During this time Petitioner had three parole officers. Two of the three officers testified during this proceeding. There was no specific reason as to why petitioner was assigned three different parole officers.

Petitioner's supervision included monthly meetings with his parole officer. He was also required to obtain permission for travel outside of the Western District of Michigan. At their discretion the parole officers could implement surveillance procedures, and this was done on at least one occasion. Parole officers also made infrequent visits to Petitioners's home and/or place of work. Petitioner was also required to inform his parole officer of his employment.

Included in the record are examples of the forms required to be completed during a parole period. Exhibit D is a United States Parole Form that sets forth the conditions of parole. Mere conditions are established by the United States Parole Commission or the United States District

Court. The first twelve (12) conditions listed on page two of this exhibit were applicable to Petitioner during his parole. Condition Number 13 and Special Conditions were not in writing at the time of Petitioners' parole.

Exhibit E is in the form that the parole officer was required to complete. Exhibit F is the Monthly Supervision Report that must be completed in conjunction with petitioner's monthly meeting with his parole officer. Exhibit G is the Permission to Travel form that was needed by Petitioner for travel authorization.

The record includes the testimony of Parole Officer Patricia Ann Scrutchions who supervised Petitioner from August 1988 through February 1991; and Parole Officer Ian R. Dingwall who supervised Petitioner from February 1991 to June 1992. Their testimonies set forth with more specificity Petitioner's conduct during his parole.

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ROBERTA M HAMM, Vice Chairperson

Dated; December 10, 1993

**Constitution of the United States**

**Article 1 §10**
§10. Restrictions upon powers of states

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

**Fifth Amendment** Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**14th Amendment** Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Michigan Constitution of 1963**

**Article 6 Sec.1** Judicial power in court of justice; divisions.

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

**Article 6 Sec. 5** Court rules; distinctions between law and equity; master in chancery.

The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. The distinctions between law and equity proceedings shall, as far as practicable, be abolished. The office of master in chancery is prohibited.

**Article 6, Section 28** Administrative action, review

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. Findings of fact in workmen's compensation proceedings shall be conclusive in the absence of fraud unless otherwise provided by law.

**Michigan Compiled Laws 338.41** Good moral character

Sec. 1. The phrase "good moral character", or words of similar import, when used as a requirement for an occupational or professional license in the Michigan Compiled Laws or administrative rules established thereunder shall be defined as the ability of the license applicant to serve the public in the licensed area in a fair, honest, and open manner.

**Michigan Compiled Laws 338.42** Effect of prior convictions

Sec.2. A license shall not be denied solely on the basis of prior misdemeanor or felony conviction unless it is related reasonably and adversely to the ability to serve the public in the licensed area. When so used the license applicant shall be notified and shall be permitted to rebut the evidence by showing that at the current time he has the ability to, and is likely to, serve the public in a fair, honest, and open manner and that at the current time he is rehabilitated and has the ability to and is likely to serve the public in the licensed area in a fair, honest, and open manner or that the substance of the former offense is not reasonably related to the occupation or profession for which he seeks to be licensed.

**Michigan Compiled Laws 338.43** Criminal records

Sec. 3. Criminal records shall not be used, distributed or disseminated in connection with the application for a permit, registration, license, or certificate: (1) records of arrest not followed by a valid conviction; (2) convictions which have been annulled or expunged; (3) misdemeanor convictions not involving moral turpitude; (4) misdemeanor convictions for which no jail sentence can be imposed.

**Michigan Compiled Laws 338.44** Information as applicant's fitness

Sec. 4. Nothing in this act shall be construed to bar the use by a licensing agency in its determination of an applicant's fitness, of any other public record, not related to arrest or prosecution, or of any other source of unbiased and accurate information. MCL 338.45 Statement as to basis for denial of license; rehearing

Sec. 5. When an applicant is found to be unqualified for a license because of a lack of good moral character, or similar criteria, he shall be furnished by the board with a statement to this effect, which statement shall contain a complete record of the evidence upon which the determination was based. The applicant shall be entitled, as of right, to a rehearing on the issue, before the board if he has relevant evidence, not previously considered, regarding his qualifications.

**Michigan Compiled Laws 338.46** Judicial review

Sec. 6. A license applicant, aggrieved by a licensing agency determination regarding the applicant's possession of good moral character, may, if unsatisfied by his administrative appeal, as provided in section 5, bring an action in circuit court for a review of the record. If, in the opinion of the circuit court, the record does not disclose a lack of good moral character, as defined in this act, the court shall so state and shall order the board to issue the license, when all other licensing requirements are complied with.

MCL 338.47 Discipline by licensing agencies

Sec. 7. This act does not affect the power of a licensing agency to discipline licensees under its jurisdiction for prohibited acts of professional misconduct or dishonesty.

## MICHIGAN COURT RULES OF 1985

**1.100 Applicability; Construction**

**1.101 Title; Citation**

These rules are the "Michigan Court Rules of 1985". An individual rule may be referred to as "Michigan Court Rule ____", and cited by the symbol "MCR _____". For example, this rule may be cited as MCR 1.101.

**1.102 Effective Date**

These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice.

**1.103 Applicability**

The Michigan Court Rules govern practice and procedure in all courts established by the constitution and laws of the State of Michigan. Rules stated to be applicable only in a specific court or only to a specific type of proceedings apply only to that court or to that type of proceeding and control over general rules.

**1.104 Statutory Practice Provisions**

Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court

**1.105 Construction**

These rules are to be construed to secure the just, speedy, and economical determination of every action and to avoid the consequences or error that does not affect the substantial rights of the parties.

## 1.200 AMENDMENT OF MICHIGAN COURT RULES

### 1.201 Amendment Procedure

(A) Notice of Proposed Amendment. Before amending the Michigan Court Rules, the Supreme Court will notify the secretary of the State Bar of Michigan and the state court administrator of the proposed amendment and the manner in which comments may be made.

(B) Notice to Bar. The state bar secretary shall notify the appropriate state bar committees or sections of the proposed amendment and the manner in which comments may be made. Unless otherwise directed by the Supreme Court, the proposed amendment shall be published int he Michigan Bar Journal.

(C) Notice to Judges. The state court administrator shall notify the presidents of the Michigan Judges Association, the Michigan District Judges Association,a nd the Michigan Probate and Juvenile Court Judges Association of the proposed amendment and the manner in which comments on the proposal may be made.

(D) Need for Immediate Action. The Court may modify or dispense with the notice requirements of this rule if it determines that there is a need for immediate action.

## 9.100 ATTORNEY GRIEVANCE COMMISSION; ATTORNEY DISCIPLINE BOARD

### 9.108 Attorney Grievance Commission

(A) Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

**9.109 Grievance Administrator.**

(A) Appointment. The administrator and the deputy administrator must be attorneys. The commission shall recommend one or more candidates for appointment as administrator and deputy administrator. The Supreme Court shall appoint the administrator and the deputy administrator, may terminate their appointments at any time with or without cause, and shall determine their salaries and the other terms and conditions of their employment.

(B) Powers and Duties. The administrator has the power and duty to:

(1) employ or retain attorneys, investigators, and staff with the approval of the commission;

(2) supervise the attorneys, investigators and staff;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his or her own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; and

(8) perform other duties provided in these rules or assigned by the commission.

**9.110 Attorney Discipline Board**

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan Attorneys.

**9.111 Hearing Panels**

(A) Composition; Quorum. The board must annually appoint 3 attorneys to each hearing panel and must fill a vacancy as it occurs. A hearing panel must elect a chairperson, vice-chairperson, and secretary, whose duties are the same as those officers of the board. A hearing panel must convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by majority vote.

(B) Powers and Duties. A hearing panel shall do the following:

(1) hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) receive evidence and make written findings of fact.

(3) discipline and reinstate attorneys or dismiss a complaint by order, under these rules.

(4) report its actions to the board within 28 days after the conclusion of a hearing.

(5) perform other duties provided in these rules.

**9.115 Hearing Panel Procedure.**

(A) Rules Applicable. Except as otherwise provided in these rules, the general court rules governing practice and procedure in a nonjury civil case apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of subchapter 2.100. The original of the formal complaint and all other pleadings must be filed with the board. The formal complaint must be

served on the respondent. All other pleadings must be served on the opposing party and each member of the hearing panel. Proof of service of the formal complaint may be filed at any time prior to the date of the hearing. Proof of service of all other pleadings must be filed with the original pleadings.

(B) Complaint. Except as provided by MCR 9.120, a complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute, or a settlement between the complainant and the respondent does not itself affect the right of the administrator to proceed.

(C) Service. Service of the complaint and all subsequent pleadings and orders must be made by personal service or by registered or certified mail addressed to the person at the person's last known address. An attorney's last known address is the address on file with the state bar as required by Rule 2 of the Supreme Court Rules Concerning the State Bar of Michigan. A respondent's attorney of record must also be served, but service may be made under MCR 2.107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

(D) Answer.

(1) within 21 days after the complaint is served, the respondent shall file and serve a signed answer as provided in subrule (A).

(2) A default, with the same effect as a default in a civil case, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or

explaining the complaint, or asserting the grounds for failing to do so.

(E) Representation by Attorney. The respondent may be represented by an attorney, who must enter an appearance.

(F) Prehearing Procedure.

(1) Extensions. If good cause is shown, the hearing panel may grant one extension of time for filing pleadings or may grant one adjournment of a hearing. Additional requests may be granted by the board. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint is not necessarily grounds for an adjournment.

(2) Motions to Disqualify.

(a) Within the time permitted to file an answer, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of MCR 2.003.

(b) The board shall assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board must reassign the complaint to another panel.

(3) Amendment of Pleadings. A pleading may not be amended except on leave granted by the board or the assigned hearing panel.

(4) Discovery. Pretrial or discovery proceedings are not permitted, except as follows:

(a) within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the

administrator need not comply prior to the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(b) Within 21 days of the service of a formal complaint, a party may demand in writing that the opposing party supply written notification of the name and address of any person to be called as a witness. Within 14 days after the service of a written demand, the notification shall be supplied. However, the administrator need not comply prior to the filing of the respondent's answer to the formal complaint; in such cases, the administrator shall comply with the written demand within 14 days of the filing of the respondent's answer to the formal complaint. The respondent shall comply with the written demand within 14 days, except that the respondent need not comply until the time for filing an answer to the formal complaint has expired. Except for good cause shown a party who is required to give said notification must give supplemental notice to the adverse party within 7 days after any additional witness has been identified, and must give the supplemental notice immediately if the additional witness is identified less than 14 days before a scheduled hearing;

(c) A deposition may be taken of a witness living outside the state or physically unable to attend the hearing.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions

or otherwise narrow the issues presented by the pleadings. If a party fails to comply with subrule (F)(4)(a) or (b), the hearing panel or the board may, on motion and showing of material prejudice as a result of the failure, impose one or more of the sanctions set forth in MCR 2.313(B)(2)(a)-(c).

(5) Discipline by Consent. A respondent may offer to plead nolo contendere or admit all essential facts contained in the complaint or any of its allegations in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. If approved, the hearing panel shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not binding on the respondent or the administrator; the matter must then be referred for hearing to a hearing panel other than the one that passed on the proposed discipline.

(G) Hearing Time and Place; Notice. The board or the chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served by the board or the chairperson of the hearing panel on the administrator, the respondent and complainant, and any attorney of record at least 21 days before the initial hearing. Unless the chairperson otherwise directs, the hearing must be in the county in which the respondent has or last had his or her office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel or to a master.

(H) Respondent's Appearance. The respondent shall personally appear at the hearing and is subject to cross-examination as an opposite party under MCL 600.2161;

MSA 27A.2161. If the respondent, or the respondent's attorney on his or her behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own initiative may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

(I) Hearing; Contempt.

(1) A hearing panel may issue subpoenas (including subpoenas for production of documents and other tangible things), cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan Rules of Evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or the respondent's attorney. A subpoenaed witness must be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court. Parties must notify their own witnesses of the date, time, and place of the hearing.

(2) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he or she has been ordered to do so, is in contempt. The administrator may initiate a contempt proceeding under MCR 3.606 in the circuit court for the county where the act or refusal to act occurred.

(J) Decision.

(1) The hearing panel must file separate reports of its decisions on the misconduct charges and, if applicable, the resulting discipline. The reports must include a certified

transcript, pleadings, exhibits, briefs, and findings of fact. The discipline report must also include a summary of all previous misconduct for which respondent was disciplined.

(2) Upon a finding of misconduct, the hearing panel shall conduct a separate hearing, as soon thereafter as practicable, to determine the appropriate discipline.

(3) If the hearing panel finds that he charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline to take effect 21 days after it is served on the respondent unless the panel finds good cause for the order to take effect earlier. In determining the discipline to be imposed, any and all relevant evidence of aggravation or mitigation shall be admissible, including previous admonitions and orders of discipline.

(4) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(5) The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

(K) Stay of Discipline. If a discipline order is a suspension of 179 days or less, a stay of the discipline order will automatically issued on the timely filing by the respondent of a petition for review. The stay remains effective until further order of the board. The respondent may petition the board for a stay pending review or reconsideration of other discipline orders.

(L) Enforcement. The administrator and his or her legal counsel shall take the necessary steps to enforce a discipline order after it is effective.

(M) Resignation by Respondent; Admission of

Charges. An attorney's request that his or her name be stricken from the official register of attorneys may not be accepted while a request for investigation of or a complaint is pending, except pursuant to an order of revocation.

**9.118 Review of Order of Hearing Panel.**

(A) Review of Order; Time.

(1) The administrator, the complainant, or the respondent may petition the board in writing to review the order of the hearing panel filed under MCR 9.115(J). The petition for review must set forth the reasons and the grounds on which review is sought and must be filed with the board within 21 days after the order is served. The petitioner must serve copies of the petition on the other party and file a proof of service with the board.

(2) A cross-petition for review may be filed within 21 days after the petition for review is served on the cross-petitioner.

(3) A delayed petition for review may be considered by the board under the guidelines of MCR 7.205(F).

(B) Order to Show Cause. On timely filing of a petition for review, the board shall issue an order to show cause, at a date and time specified, why the order of the hearing panel should not be affirmed. The board must serve the order to show cause on the administrator, complainant, and respondent at least 21 days before the hearing. Failure to comply with the order to show ause, incldung but not limited to a requirement for briefs, may be grounds for dismissal of a petition for revview. Dismissal of a petition for review shall not affect the validity of a cross-petition for review.

(C) Hearing.

(1) A hearing on the order to show cause must be heard by at least 3 board members assigned by the chairperson. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the subboard and the subboard's recommendation. The respondent shall appear personally at the review hearing unless excused by the board. Failure to appear may result in denial of any relief sought by the respondent, or any other action allowable under MCR 9.118(D).

(2) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or a master. The panel or the master shall then take the additional testimony and make a supplemental report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of the hearing panel.

(D) Decision; Motion for Reconsideration; Stay. After the hearing on the order to show cause, the board may affirm, amend, revise, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 21 days after it is served on the respondent unless the board finds good cause for the order to take effect earlier. If the board grants a stay, the stay remains effective for 21 days after the board enters its order granting or denying reconsideration.

(E) Filing Orders. The board may file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where his or her office is located. The order must be served on all parties.

If the respondent requests it in writing, a dismissal order must be similarly filed and served.

**9.122 Review by the Supreme Court.**

(A) Kinds Available; Time for Filing.

(1) A party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under MCR 9.118, may apply for leave to appeal to the Supreme Court under MCR 7.302 within 21 days after the order is entered. If a motion for reconsideration is filed before the board's order takes effect, the application for leave to appeal to the Supreme Court may be filed within 21 days after the board enters its order granting or denying reconsideration.

(2) If a request for investigation has been dismissed under MCR 9.112(C)(1) or 9,114(A) a party aggrieved by the dismissal may file a complaint for mandamus in the Supreme Court under MCR 7.304.

(B) Rules Applicable. Except as modified by this rule, chapter 7.300 governs an appeal.

(C) Stay of Order. If the discipline order is a suspension of 179 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

(D) Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and

all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

(E) Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

**9.123 Eligibility for Reinstatement**

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less is automatically reinstated by filing with the Supreme Court clerk, the board, and the administrator an affidavit showing that the attorney has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

(B) Revocation or Suspension For More Than 179 Days. An attorney whose license to practice law has been revoked or suspended for more than 179 days is not eligible for reinstatement until the attorney has petitioned for reinstatement under MCR 9.124 and has established by clear and convincing evidence that:

(1) he or she desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he or she has not practiced or attempted to practice law contrary to the requirement of his or her suspension or revocation;

(4) he or she has complied fully with the order of discipline;

(5) his or her conduct since the order of discipline has been exemplary and above reproach;

(6) he or she has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself or herself in conformity with those standards;

(7) taking into account the nature of the misconduct which led to the revocation or suspension, he or she nevertheless can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he or she is in compliance with the requirements of subrule (C), if applicable; and

(9) he or she has reimbursed the client security fund of the State Bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his or her conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

(C) Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of disciplinary or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

*(D) Petition for Reinstatement; Filing Limitations.

(1) An attorney whose license to practice law has been suspended may not file a petition for reinstatement

earlier than 56 days before the term of suspension ordered has fully elapsed.

(2) An attorney whose license to practice law has been revoked may not file a petition for reinstatement until 5 years have elapsed since revocation of the license.

(3) An attorney whose license to practice law has been revoked or suspended and who has been denied reinstatement may not file a new petition for reinstatement until at least 180 days from the effective date of the most recent hearing panel order granting or denying reinstatement. [Amended effective March 1, 1994; September 15, 1994.]

**9.124 Procedure for Reinstatement**

(A) Filing of Petition. An attorney shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the commission and the board. If the petition is in proper form, the board must assign it to a hearing panel.

(B) Administrator's Responsibilities. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report his or her findings in writing to the hearing panel, and serve a copy on the petitioner. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. At least 28 days before the hearing, the administrator shall publish in the Michigan Bar Journal a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be provided for reinstatement.

(C) Hearing Panel's Responsibilities. A reinstatement hearing may not be held earlier than 56 days after the

petition was served on the administrator. The proceeding on a petition for reinstatement must conform as nearly as practicable to a proceeding for hearing on a complaint. The petitioner shall appear personally for cross-examination before the hearing panel and answer fully and fairly under oath all questions on his or her eligibility for reinstatement. The hearing panel must enter an order granting or denying reinstatement or conditioning reinstatement on compliance with MCR 9.123(B)(8) or (9) and make a written report signed an certified by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. The report and order must be filed an served under MCR 9.118(E).

(D) Review. Review is available under the rules governing review of other hearing panel orders.

**Michigan General Court Rules of 1963**
**Rule 957 Attorney Grievance Commission**

.1 Authority of Commission. The Attorney Grievance Commission is the prosecution arm of the Supreme Court for discharge of its constitutional responsibility to supervise and discipline Michigan attorneys.

**Rule 958 Grievance Administrator.**

.1 Powers and Duties. The administrator has the power and duty to:

(1) employ or retain legal counsel, investigators, and staff with the approval of the commission;

(2) supervise legal counsel, his staff and investigators;

(3) assist the public in preparing requests for investigation;

(4) maintain the commission records created as a result of these rules;

(5) investigate alleged misconduct of attorneys, including serving a request for investigation in his own name if necessary;

(6) prosecute complaints the commission authorizes;

(7) prosecute or defend reviews and appeals as the commission authorizes; and

(8) perform other duties provided in these rules or assigned by the commission.

**Rule 959 Attorney Discipline Board**

.1 Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan Attorneys.

**Rule 960 Hearing Panels**

.1 Composition; Quorum. The board shall annually appoint 3 attorneys to each hearing panel and shall fill a vacancy as it occurs. A hearing panel shall elect a chairperson, vice-chairperson, and secretary, whose duties are the same as those officers of the board. A hearing panel shall convene at the time and place designated by its chairperson or by the board. Two members constitute a quorum. A hearing panel acts by majority vote.

.2 Powers and Duties. A hearing panel shall:

(1) hold a public hearing on a complaint or reinstatement petition assigned to it within 60 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 90 days after it is begun, unless

the board grants an extension for good cause shown.

(2) receive evidence and make written findings of fact;

(3) discipline and reinstate attorneys or dismiss a complaint by order, under these rules;

(4) report its actions to the board within 30 days of the conclusion of a hearing; and

(5) perform other duties provided in these rules.

**Rule 964 Hearing Panel Procedure.**

.1 Rules Applicable. Except as otherwise provided in these rules, the general court rules governing practice and procedure in a nonjury civil case apply to a proceeding before a hearing panel. Pleadings must conform as nearly as practicable to the requirements of the general court rules.

.2 Complaint. A complaint setting forth the facts of the alleged misconduct begins proceedings before a hearing panel. The administrator shall prepare the complaint, file it with the board, and serve it on the respondent and, if the respondent is a member of or is associated with a law firm, on the firm. The unwillingness of a complainant to prosecute or a settlement between the complainant and the respondent does not itself affect the right of the administrator to proceed.

.3 Service. Service under these rules must be made by personal service or by registered or certified mail addressed to the person at his last known address. An attorney may be served at the address he files with the state bar. A respondent's counsel of record must also be served, but service may be made under GCR 1963, 107. Service is effective at the time of mailing, and nondelivery does not affect the validity of the service.

.4 Answer.

(a) within 20 days after the complaint is served on him, the respondent shall file a signed answer with the board and serve a copy on the administrator and the hearing panel.

(b) A default, with the same effect as a default in a civil case, may enter against a respondent who fails within the time permitted to file an answer admitting, denying, or explaining the complaint, or asserting the grounds for failing to do so.

.5 Representation by Counsel. The respondent may be represented by counsel. Counsel shall enter an appearance.

.6 Prehearing Procedure.

(a) Extensions. If good cause is shown, the hearing panel may grant one extension of time for filing pleadings or may grant one adjournment of a hearing. Additional requests may be granted by the board. Pending criminal or civil litigation of substantial similarity to the allegations of the complaint does not require an adjournment.

(b) Motions to Disqualify.

(1) Within the time permitted to file an answer, the respondent or the administrator may move to disqualify a member of the hearing panel. The board chairperson shall decide the motion under the guidelines of GCR 1963, 912.

(2) The board shall assign a substitute for a disqualified member of a hearing panel. If all are disqualified, the board shall reassign the complaint to another panel.

(c) Amendment of Pleadings. A pleading may not be amended except on leave granted by the board or the assigned hearing panel.

(d) Discovery. Pretrial or discovery proceedings are not permitted, except

(1) within 15 days after the answer to the complaint is filed, the administrator shall, on the respondent's written demand, make available for inspection or copying by the respondent documentary evidence in the administrator's possession that is to be introduced as evidence at the hearing;

(2) within the same time, the administrator shall give the respondent written notification of the name and address of any person to be called as a witness. The administrator shall give supplemental notice to the respondent within 5 days after any additional witness has been identified and at least 10 days before a scheduled hearing;

(3) a deposition may be taken of a witness living outside the state or physically unable to attend the hearing;

(4) the hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

If the administrator fails to comply with subrules 964.6(d)(1) or (2), the hearing panel or the board may on motion and showing of material prejudice as a result of the failure impose one or more of the sanctions set forth in GCR 1963, 313.2(2)(a)-(c).

(e) Discipline by Consent. A respondent may offer to plead nolo contendere or admit all essential facts contained in the complaint or any of its counts in exchange for a stated form of discipline and on the condition that the plea or admission and discipline agreed on is accepted by the commission and the hearing panel. If approved, the hearing panel shall enter a final order of discipline. If not approved, the offer is deemed withdrawn and statements or stipulations made in connection with the offer are inadmissible in disciplinary proceedings against the respondent and not

binding on the respondent or the administrator; and the matter is to be referred for hearing to a hearing panel other than the one that passed on the proposed discipline by consent.

.7 Hearing Time and Place; Notice. The chairperson of the hearing panel shall set the time and place for a hearing. Notice of a hearing must be served on the respondent and complainant at least 10 days before the hearing. Unless the chairperson otherwise directs, the hearing must be in the county in which the respondent has or last had his office or residence. If the hearing panel fails to convene or complete its hearing within a reasonable time, the board may reassign the complaint to another panel.

.8 Respondent's Appearance. The respondent shall personally appear at the hearing. He is subject to cross examination as an opposite party under MCLA 600.2161; MSA 27A.2161. If the respondent, or counsel in his behalf, claims physical or mental incapacity as a reason for the respondent's failure to appear before a hearing panel or the board, the panel or the board on its own motion may suspend the respondent from the practice of law until further order of the panel or board. The order of suspension must be filed and served as other orders of discipline.

.9 Hearing; Contempt.

(a) A hearing panel may issue subpoenas, including subpoenas duces tecum, cause testimony to be taken under oath, and rule on the admissibility of evidence under the Michigan rules of evidence. The oath or affirmation may be administered by a panel member. A subpoena must be issued in the name and under the seal of the board. It must be signed by a panel or board member, by the administrator, or by the respondent or his counsel. A subpoenaed witness must

be paid the same fee and mileage as a witness subpoenaed to testify in the circuit court.

(b) A person who without just cause fails or refuses to appear and give evidence as commanded by a subpoena, to be sworn or affirmed, or to answer a proper question after he has been ordered to do so is in contempt. The administrator may initiate a contempt proceeding under GCR 1963,760 in the circuit court for the county where the act or refusal to act occurred.

.10 Decision. The hearing panel shall file a separate report, including a certified transcript of the testimony, pleadings, exhibits, briefs, a summary of all previous misconduct for which respondent was disciplined, and its findings of fact.

(1) If the hearing panel finds that the charge of misconduct is not established by a preponderance of the evidence, it must enter an order dismissing the complaint.

(2) If the hearing panel finds that he charge of misconduct is established by a preponderance of the evidence, it must enter an order of discipline to take effect 20 days after it is served on the respondent unless the panel finds good cause for the order to earlier take effect.

The report and order must be signed by the panel chairperson and filed with the board and the administrator. A copy must be served on the parties as required by these rules.

.11 Stay of Discipline. If the respondent petitions the board for a review and a stay of the discipline order before the panel's order is effective, the discipline order does not take effect until ordered by the board.

.12 Enforcement. The administrator and his legal counsel shall take the necessary steps to enforce a discipline order after it is effective.

.13 Resignation by Respondent; Admission of Charges. An attorney's request that his name be stricken from the official register of attorneys may not be accepted while a request for investigation of his misconduct or a complaint against him is pending, unless the attorney admits the misconduct in writing or by default. The attorney's request entitles the hearing panel to find that the misconduct charge is true and to enter an order revoking his license.

**Rule 967 Review of Order of Hearing Panel.**

.1 Review of Order; Time. The administrator, the complainant, or the respondent may move the board in writing to review the order of the hearing panel filed under rule 964.10. The motion must set forth the reasons and the grounds on which review is sought and must be filed with the board within 20 days after the order is served.

.2 Order to Show Cause. On timely filing of a motion for review, the board shall issue an order to show cause, at a date an time specified, why the order of the hearing panel should not be affirmed. The administrator must serve the order to show cause on the administrator, complainant, and respondent at lease 20 days before the hearing.

.3 Hearing.

(a) A hearing on the order to show cause must be heard by at least 3 board members, including a lay member, assigned by the chair-person. The board must make a final decision on consideration of the whole record, including a transcript of the presentation made to the sub-board and the sub-board's recommendation.

(b) If the board believes that additional testimony should be taken, it may refer the case to a hearing panel or

a master. The panel or the master shall then take the additional testimony and make a supplemental report, including findings of fact and recommendations, and shall file the report, including a transcript of the additional testimony, pleadings, exhibits, and briefs with the board. Notice of the filing of the supplemental report and a copy of the report must be served as an original report and order of the hearing panel.

.4 Decision. After the hearing on the order to show cause, the board may affirm, amend, revise, or nullify the order of the hearing panel in whole or in part or order other discipline. A discipline order is not effective until 20 days after it is served on the respondent unless the board finds good cause for the order to earlier take effect.

.5 Filing Orders. The board may file a copy of its discipline order with the Supreme Court clerk and the clerk of the county where the respondent resides and where he had his office. The order must be served on all parties. If the respondent requests it in writing, a dismissal order must be similarly filed and served.

**Rule 971 Review by the Supreme** Court.

.1 Kinds Available; Time for Filing.

(a) a party aggrieved, including the person who made a request for investigation, by a final order of discipline or dismissal entered by the board on review under rule 967 may apply for leave to appeal in the Supreme Court under rule 853 within 20 days after the order is entered.

(b) If the administrator has dismissed a request for investigation under sub-rule 961.3(a) or 963.1, a party aggrieved by the dismissal may file a complaint for mandamus in the Supreme Court under sub-rule 862.5(b).

.2 Rules Applicable. Except as modified by this rule, chapter 85 governs an appeal.

.3 Stay of Order. IF the discipline order is a suspension of 120 days or less, a stay of the order will automatically issue on the timely filing of an appeal by the respondent. The stay remains effective until conclusion of the appeal or further order of the Supreme Court. The respondent may petition the Supreme Court for a stay pending appeal of other orders of the board.

.4 Record on Appeal. The original papers constitute the record on appeal. The board shall certify the original record and file it with the Supreme Court promptly after the briefs of the parties have been filed. The record must include a list of docket entries, a transcript of testimony taken, and all pleadings, exhibits, briefs, findings of fact, and orders in the proceeding. If the record contains material protected, the protection continues unless otherwise ordered by the Supreme Court.

.5 Disposition. The Supreme Court may make any order it deems appropriate, including dismissing the appeal. The parties may stipulate to dismiss the appeal with prejudice.

**Rule 972 Eligibility for Reinstatement**

.1 Suspension, 120 Days or Less. An attorney whose license has been suspended for 120 days or less is automatically reinstated by filing with the Supreme Court clerk and the administrator an affidavit showing that he has fully complied with the terms and conditions of the suspension order. A false statement contained in the affidavit is ground for disbarment.

.2 Revocation or Suspension For More Than 120

Days. An attorney whose license to practice law has been revoked or suspended for more than 120 days is not eligible for reinstatement until he has petitioned for reinstatement under GCR 1963, 973 and has established by clear and convincing evidence that:

(1) he desires in good faith to be restored to the privilege of practicing law in Michigan;

(2) the term of the suspension ordered has elapsed or 5 years have elapsed since revocation of the license;

(3) he has not practiced or attempted to practice law contrary to the requirement of his suspension or revocation;

(4) he has complied fully with the order of discipline;

(5) his conduct since the order of discipline has been exemplary and above reproach;

(6) he has a proper understanding of and attitude toward the standards that are imposed on members of the bar and will conduct himself in conformity with those standards;

(7) he can safely be recommended to the public, the courts, and the legal profession as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and as an officer of the court;

(8) he is in compliance with the requirements of subrule 972.3, if applicable; and

(9) he has reimbursed the client security fund of the state bar of Michigan or has agreed to an arrangement satisfactory to the fund to reimburse the fund for any money paid from the fund as a result of his conduct. Failure to fully reimburse as agreed is ground for revocation of a reinstatement.

.3 Reinstatement After Three Years. An attorney who, as a result of disciplinary proceedings, resigns, is disbarred, or is suspended for any period of time, and who does not practice law for 3 years or more, whether as the result of the period of disciplinary or voluntarily, must be recertified by the Board of Law Examiners before the attorney may be reinstated to the practice of law.

**Rule GCR 973 Reinstatement**

.1 Filing of Petition. An attorney must file the original petition for reinstatement with the Supreme Court clerk and a copy with the commission and the board. If the petition is in proper form, the board shall assign it to a hearing panel.

.2 The Administrator's Responsibilities. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report his findings in writing to the hearing panel, and serve a copy on the petitioner. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petitioner's eligibility for reinstatement. At least 30 days before the hearing, the administrator shall publish in the State Bar Journal a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be provided for reinstatement.

.3 The Hearing Panel's Responsibilities. A reinstatement hearing may not be held earlier than 60 days after the petition was served on the administrator. The proceeding on a petition for rein statement must conform as nearly as practicable to a proceeding for hearing on a complaint. The petitioner shall appear personally for cross-

examination before the hearing panel and answer fully and fairly under oath all questions on his eligibility for reinstatement. The hearing panel shall enter an order granting or denying reinstatement or conditioning reinstatement on compliance with subrule 972.2(8) or 972.2(9) and make a written report signed an certified by the chairperson, including a transcript of the testimony taken, pleadings, exhibits and briefs, and its findings of fact. The report and order must be filed an served under subrule 967.5.

.4 Review. Review is available under the rules governing review of other hearing panel orders.